TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 258

COMMERCIAL SHORT COMPANY, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVEN CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1937

CERTIORARI GRANTED OCTOBER 18, 1937

(32,702)

(32,702)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 258

COMMERCIAL CREDIT COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT.

TIME OF COMMENCEMENT OF SUIT.

November 23, 1925.

NAMES OF PARTIES TO SUIT.

United States of America, Libellant.

One Ford Coupe, Motor No. 10587243, Tools and Accessories, Libelee.

Commercial Credit Company, a Corporation, Claimant.

NAMES AND ADDRESSES OF COUNSEL.

JOHN J. KENNETT, Esquire, Proctor for Appellant, 2014–15 L. C. Smith Bldg., Seattle, Washington.

THOS. P. REVELLE, Esquire, Proctor for Appellee, 310 Federal Building, Seattle, Washington.

ARTHUR E. SIMON, Esquire, Proctor for Appellee, 307 Federal Building, Seattle, Washington.

PAUL D. COLES, Esquire, Proctor for Appellee, 303 Federal Building, Seattle, Washington.

DATE OF FILING PLEADINGS.

Libel of Information filed November 23, 1925.

Claim and Answer of Commercial Credit Company, a Corporation, filed December 16, 1925.

Amended Answer of Commercial Credit Company, a corporation, filed March 24, 1926.

ATTACHMENT OF PROPERTY AND PROCEEDINGS.

Warrant of arrest and monition against libellee was issued out of said District Court on libel of information on November 23, 1925, and said libellee was arrested by United States Marshal for the Western District of Washington, Northern Division under [1*] said warrant of arrest on November 23, 1925, and released into custody of claimant on January 4, 1926, upon Claimant's posting bond in the sum of $500.00. Claimant duly filed its stipulation for costs and issue was joined on March 24, 1926.

A stipulation waiving trial by jury was filed and cause came on for trial on March 29, 1926, before the Honorable George M. Bourquin, United States District Judge. Claimant's motion to dismiss and the whole case was taken under advisement on said date.

The trial of said cause on merits was in open court, and said cause was not referred to a Commissioner.

Final decree was entered in said cause on May 5, 1926.

Notice of appeal was filed in said cause on May 13, 1926, and service admitted by proctor for libelant on May 13, 1926.

Citation on appeal was issued out of said Dis-

*Page-number appearing at foot of page of original certified Apostles on Appeal.

trict Court May 17, 1926, and service admitted by proctor for libellant May 17, 1926. [2]

(Wash. 5240.)

United States District Court, Western District of Washington, Northern Division.

No. 10,183.

UNITED STATES OF AMERICA,
Libelant,

vs.

ONE FORD COUPE, Motor No. 10587243, Washington License No. 274864, and Tools and Accessories, and LEO OPPIE,
Libelees.

INFORMATION.

To the Honorable, the Judge of the District Court of the United States for the Western District of Washington:

Now comes C. T. McKinney, Assistant United States Attorney for the Western District of Washington, who prosecutes for and on behalf of the United States of America, and exhibits this information against One Ford Coupe, Motor No. 10587243, Washington License No. 274864, and tools and accessories, and Leo Oppie, and against all persons lawfully intervening for their interest therein; which aforesaid property was duly seized

in the aforesaid district and division on the 9th day of October, 1925, by W. M. Whitney, a Deputy Collector of Internal Revenue for the State of Washington, and an officer of the law, and is still held in custody within said district and division in pursuance of such seizure; and thereupon the said Assistant United States Attorney doth allege and give the Court to understand, as follows: [3]

THAT on or about the 9th day of October, 1925, at the city of Seattle, in the county of King, in the State of Washington, and within the Northern Division of the Western District of Washington, and before said seizure, the said property above described was by Leo Oppie, used in the removal, and for the deposit and concealment of a large quantity of intoxicating liquor, the exact quantity and character of said intoxicating liquor being to the informant unknown, with intent to defraud the United States of the tax thereon, the said intoxicating liquor then and there being a commodity for which and in respect whereof a tax theretofore had been and then was imposed by the laws of the United States, which tax had not been paid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WHEREFORE, the said Assistant United States Attorney for the Western District of Washington, who prosecutes as aforesaid for the United States, prays that due process of law may be

awarded in this behalf, to enforce the forfeiture of said conveyance, to wit: One Ford Coupe, Motor No. 10587243, Washington License No. 274864, and tools and accessories, so seized as aforesaid, and to give notice to all persons concerned to appear on the return date of said process to show cause, if any they have, why said forfeiture should not be adjudged.

THOS. P. REVELLE,
United States Attorney.
C. T. McKINNEY,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division,—ss.

C. T. McKinney, being first duly sworn on oath, deposes and says:

That he is a duly appointed, qualified, and acting Assistant United States Attorney for the Western District of Washington, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information, and belief.

C. T. McKINNEY.

Subscribed and sworn to before me this 23d day of November, 1925.

[Seal] T. W. EGGER,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed Nov. 23, 1925. [4]

[Title of Court and Cause.]

CLAIM OF COMMERCIAL CREDIT COMPANY, A CORPORATION.

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division:

Comes now Commercial Credit Company, a corporation, intervening for its interest in one certain Ford Coupe, Motor No. 10587243, License No. 274864, and tools and accessories, one of the respondents above named, and makes claim to said automobile and said tools and accessories, as the same is attached by the United States Marshal under process of the above-entitled court issued at the instance of the libelant above named, and said claimant alleges and avers as follows:

I.

That said claimant is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and that it has fully complied with all requirements of the laws of the State of Washington, regarding foreign corporations doing business in this state, and has by said state been licensed to transact business herein. That its principal [5] place of business within said State of Washington is at Seattle.

II.

That on or about the 14th day of November,

1924, the Howard Motor Company, owned and operated by E. L. Howard, was the owner and in possession of the above-described automobile and tools and accessories, and on or about said date entered into a Conditional Sales Contract, copy of which is hereto attached and marked Exhibit "A," and by this reference made a part hereof, with one W. G. Campbell, sometimes known and informed against in this case as Leo Oppie, by the terms of which the said W. G. Campbell agreed to buy and the said Motor Company agreed to sell the above-described automobile. That at said time said automobile was delivered to the said W. G. Campbell in accordance with the terms of said contract. That by the terms of said contract the Howard Motor Company, expressly reserved the title in and to said automobile. That thereafter within ten days, said Conditional Sales Contract was duly and properly recorded in the Auditor's Office of King County, Washington.

III.

That thereafter on the said day, that is the 14th day of November, 1924, the said Howard Motor Company for a valuable consideration assigned and transferred said Conditional Sales Contract, and all their right, title and interest thereunder to the claimant, who duly recorded said assignment, and who is now, and ever since said time, has been the owner and holder of said contract and the legal owner of the automobile herein described.

IV.

That the total purchase price of said automobile was $788.94, and that the balance remaining due on said automobile at the time it was delivered to the vendee and at the time this claimant purchased said contract was $607.19. That there [6] now remains due and owing this claimant on account of said automobile and Conditional Sales Contract the sum of $101.18, together with interest on delinquent payments, as provided for in said contract.

V.

That said vendee, W. G. Campbell, is in default under and by virtue of the terms of said contract, and as claimant is informed and believes, and therefore alleges, is insolvent, and unless said automobile is returned to the claimant herein, claimant will lose the unpaid remainder of said purchase price.

VI.

That at no time prior to the time claimant received notice that said automobile has been seized, as alleged in the information on file herein, did claimant have any knowledge either that the said automobile was used or intended to be used in any manner in violation of the laws of the United States or of any state, and that, as claimant is informed and believes, its assignor did not know or have any knowledge prior to the time of seizure of said automobile, that said automobile was used or intended to be used in any manner in violation of the laws of the United States or of any state.

WHEREFORE, claimant prays that said libel of information be dismissed and that said automobile and tools and accessories be delivered to claimant, or if said automobile should be ordered sold, that claimant be first paid out of the proceeds of said sale the sum of $101.18, plus interest still due it under the Conditional Sales Contract herein referred to.

JOHN J. KENNETT,
Attorney for Claimant. [7]

State of Washington,
County of King,—ss.

G. T. Harding, being first duly sworn, on oath deposes and says:

That he is the agent of the claimant corporation; that he has read the foregoing claim, knows the contents thereof, and that the same is true as he verily believes. That he has authority to and does make this verification for and upon behalf of said claimant.

G. T. HARDING.

Subscribed and sworn to before me this 16th day of December, 1925.

[Seal] OLIVE S. BARTER,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Copy of the within claim received this 16th day of December, 1925.

THOS. P. REVELLE,
U. S. District Atty.
By B. E. MILLER.

[Endorsed]: Filed Dec. 16, 1925. [8]

Form 200—5M sets 2-24

Exhibit A

ARIZONA, IDAHO, MONTANA, NEVADA, OREGON, UTAH, WASHINGTON
(Agreement Must Be Filed in Arizona, Montana and Washington)

WITHOUT RECOURSE
CONDITIONAL SALE AGREEMENT

(ORIGINAL)

This Agreement, made this 14th day of November, 192 4, between Howard Motor Company (Dealer's Name) of Seattle Wash. (Dealer's Address) first party, his or its successors, or assigns (hereinafter called "Seller"), and W. G. Campbell (Buyer's Name) at Humphrey Apts. 2205 2nd Ave., Seattle, Wash. (Buyer's Street Address) (Buyer's Town and State) second party (hereinafter called "Buyer")

WITNESSETH:—THAT the Seller in consideration of the payments, agreements and conditions contained herein which on the part of the Buyer are to be made, done and performed, has this day delivered and agreed to sell and the Buyer has this day agreed to buy from the Seller, but upon the conditions hereinafter recited, to the Buyer the following Passenger or Commercial Car, or Tractor hereinafter called the "Car"):

MAKE	Type of Body	Model Letter or Number	Manufacturer's Serial No.	Motor No.	No. Cylinders	Advertised Horse Power	If Truck Tons Capacity	Year Model	List Price F.O.B. Factory	Selling Price
Ford	Coupe	T	10587243		4	20		1924	525	630

with extra equipment, etc., for the cash sum of Seven Hundred Eighty-Eight & 94/100 Dollars ($ 788.94). (Total Cost to Buyer)

The Buyer has this day paid to the Seller One Hundred Eighty-One & 75/100 Dollars ($ 181.75). (Total Payment Made)

and the Buyer agrees to pay to the Seller, or order, Six Hundred Seven & 19/100 Dollars ($ 607.19). (Total Balance to Be Paid)

balance, payable in 12 installments of $ 50.59 each, on the 14th day of each succeeding month, which installments shall bear interest after maturity until paid at the highest legal contract rate and are to be evidenced by a promissory note (not as payment, but as evidence of the amounts to become due hereunder) made by the Buyer to the order of the Seller, bearing date hereof, and maturing on the due dates of said respective installments. Any extensions or assignments of this Agreement or said note shall not waive any condition herein contained.

Title to the Car and extra equipment shall not pass by delivery to the Buyer but shall remain vested in and be the property of the Seller or Assignee until the purchase price has been fully paid. Buyer agrees to operate and control said Car in conformity with all Laws and Ordinances and to indemnify and save harmless the Seller from any and all loss, or damage to persons or property caused by said Car or by the use and operation thereof to which the Seller might possibly be subjected.

Buyer agrees and acknowledges that the within contract covers all conditions and agreements between the parties, that the loss, injury or destruction of said Car shall not release said Buyer from payment as provided herein. Buyer hereby acknowledges receipt of and accepts the Car, having first examined and tested the same and found same in sound and first class condition, and agrees to keep the Car insured against loss by fire, theft, conversion and confiscation with insurance companies acceptable to the Seller for not less than the amount owing, and until fully paid, payable to and to protect the interest of the Seller or Seller's Assigns, and the Seller or Seller's Assigns may place, continue and renew such insurance for the Buyer at the Buyer's expense if the Seller or Assigns so elects, and cost of such insurance shall become a part of the Buyer's obligation hereunder.

Buyer agrees to pay all taxes that may be assessed upon the property described herein or his license fees or charges against said Car and to keep same in good condition, and that any equipment, repairs or accessories placed upon said Car shall be at Buyer's expense and become a component part thereof and included in the terms of this Agreement. Buyer further agrees not to use or permit said Car to be used for passenger hire.

Buyer further agrees that he will not use or cause or permit to be used the car, truck or tractor herein mentioned for the transportation of liquor, wines or any other beverage, for personal or commercial use, prohibited by any Federal or State statute to be transported, and it is hereby agreed that should the car, truck or tractor hereinbefore described be used for such purpose or any other unlawful purpose, it shall be considered as a default under the agreement, whether or not there shall be a default under any other terms or conditions thereof, which shall entitle the holder hereof to immediate and continued possession of the car, truck or tractor herein described.

Buyer agrees that in the event of any law or ordinance requiring the recordation of this Agreement, that it shall be recorded at the expense of the Buyer and in his name, and at any time, by the Seller, or the holder of this Agreement.

Should the Buyer fail to keep and perform any or all his agreements herein contained, and to promptly pay at maturity any and all sums hereunder, or if said Car is removed or attempted to be removed from the State in which the Buyer now resides, or to be otherwise disposed of, or if Buyer shall lend, sell or encumber, or shall attempt to sell or encumber said Car or in case of misuse or abuse thereof, or whenever the Seller or his assign shall deem the debt insecure, said Seller may without any demand or notice take possession of said Car and equipments, wherever found and without process of law. Buyer does hereby expressly waive any right of action against the Seller growing out of the removal, repossession or retention of said Car or otherwise, and hereby consents that upon any default (or in the event that the Buyer, for any reason gives up or loses possession of the Car), all unpaid balance of said purchase price shall forthwith become due and payable at the option of the Seller or Seller's assigns. Buyer agrees that all payments made shall belong to and be retained by Seller as liquidated damages for the nonfulfillment of this Agreement, for loss in value of the Car, and for the rental value thereof.

Seller may, by suit or otherwise, enforce payment of said note, and no legal proceedings with respect thereto shall be deemed any waiver of said right of Seller to take possession on default or breach as aforesaid. Upon the Seller so taking possession of the Car, Seller may sell the Car at public or private sale at any time thereafter without any notice to the Buyer, and said Seller may become the purchaser thereof, and if the proceeds thereof are insufficient to pay all sums remaining unpaid hereunder and the expense caused by such repossession, removal, reparation, storage, liens and sale, including all collection expense and a reasonable attorney's fee, incurred in taking possession of said Car, or in or about the sale thereof, or in collecting in any manner any sums which may be due and owing hereunder, Buyer agrees to pay any deficiency as damages for use of said property. The waiver or indulgence of any default shall not operate as a waiver of subsequent defaults.

Buyer agrees that said Seller, in case said Buyer fails to comply with any of the agreements aforesaid on Buyer's part to be performed, may, at Seller's option, cause judgment to be entered against said Buyer upon this agreement for the whole amount unpaid, or upon the said note, interest and costs, whether or not the same shall have become due and payable by reason of maturity or under the conditions of this agreement, and said Buyer hereby waives stay of execution, exemption laws, right of inquisition on real estate, errors and appeals, and further authorizes any attorney of any Court of Record as his lawful attorney to appear for and confess judgment against said Buyer, and in such event the Buyer hereby agrees to pay a reasonable attorney fee. Time is of the essence of this agreement.

This agreement shall apply to and bind the heirs, executors, administrators and assigns of the Buyer, and shall inure to the benefit of the Seller, Seller's heirs, executors, administrators, successors and assigns, and contains the entire agreement between the parties hereto, their agents or employees, either verbal or written.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this Agreement, in triplicate, the day and year first above written.

WITNESS: E. E. Pinkmen

Address 4723 49th N. E.

W. G. Campbell (Seal)
(Buyer Sign Here)

By _____ (Seal)
(Owner, Officer or Firm Member)

WITNESS: _____

Address _____

Howard Motor Company (Seal)
(Dealer Sign Here)

By E. L. Howard (Seal)
(Owner, Officer or Firm Member)

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Dealer Must Sign Assignments on Reverse Side

BUYER'S STATEMENT

(ORIGINAL)

Town Seattle Wash State

Date Nov. 14th 1924 192

To Howard Motor Company
(Manufacturer, Distributor or Dealer) and to COMMERCIAL CREDIT COMPANY, San Francisco, Calif.

For the purpose of securing credit from you on my (our) obligation hereto attached, given per statement herein, for a new Ford (Passenger or Commercial Car or Tractor), delivery and receipt of which is hereby acknowledged, I (we) hereby warrant that: I (we) can meet the payments provided for in said obligation as they become due, and I (we) covenant not to sell, trade, encumber or give up possession of the car, truck or tractor, and that same will not be used for passenger hire without your written consent until paid for in full.

MY PRESENT BUSINESS, PROFESSION OR POSITION IS Broker I have been so employed 3 Years

Name and Address of Present Employer Myself I HAVE BEEN IN PRESENT POSITION 3 YEARS

Age 39 Married yes Number of Dependents none Monthly Salary or income $150.00 per mo.

Bank Account with Seattle National Bank Bank of Seattle Wash Town Checking acct. State.

If you do not live in your own home give name and address of Landlord: Robt. Smart 2nd & Blanchard

Have bought on credit from or other business references: Name G. English Name H.C. McLaughlin Name
Address Norman Garage Address 2035 3rd Ave. Address 4411 Meridian Ave Address

Description and location of Real Estate or Personal Property owned in my (our) name:

Description	Location	Cash Value	Owing on Same
		$	$
		$	$

Is the Passenger or Commercial Car or Tractor NEW OR USED? new For Pleasure, Hire, or Business Use? pleasure

What make Passenger or Commercial Car or Tractor have you owned other than this car? Ford If purchased on time, through what Dealer? W. O. McKay Co. What Credit Company or Bank? P.S. Savings & Loan

I carry Life Insurance for $ none with Company of

Statement of Items covering Buyer's obligation given for new Passenger or Commercial Car or Tractor

Delivered Cash Price of Passenger or Commercial Car or Tractor (If Truck, of Chassis)	$532.89
If Truck, body, cab, radiator protector, etc. Speedometer & Dash light	19.50
Extra equipment—Itemize Bumper	15.50
Bailey Brakes	25.00
Changing gas tank to rear	77.50
Ins., filing fee and bond	26.50
Cash Selling Price	$726.94
Services, Expenses and Interest (See Rate Sheet)	62.00
Total Cost to Buyer on Time	$788.94
Less: Allowance, if any, on "Trade in"	
CASH PAYMENT 1/4,	181.75
Balance in 12 Monthly Payments	$607.19

WITNESS

Address

ADDRESS OF BUYER: Telephone No.
Humphries Apts
Residence Street or R. F. D. No. 2205 wnd Ave.,
Town Seattle State Wash

How long have you lived here? five Years

Business Address Street or R. F. D. No.

Town State

Remarks

Signed W. G. Campbell
(Buyer)

By
(Owner, Firm Member or Officer)

AUTHORIZED DEALER'S ASSIGNMENT COVERING MONTHLY PAYMENT CONTRACTS EXCLUDING AGRICULTURAL AND TRACTOR CONTRACTS

(ORIGINAL)

FOR VALUE RECEIVED, the within agreement between and the undersigned, and all right, title and interest of the undersigned in and to the property therein described, together with all moneys due or to become due and payable thereunder, are hereby sold, assigned, transferred and set over by the undersigned to COMMERCIAL CREDIT COMPANY, San Francisco, California, its successors and assigns.

The undersigned warrants that said agreement was made in good faith and was actually signed by the person or persons named therein as the buyer; that the property is correctly described therein and has been actually delivered in good faith to the buyer therein named; that at the time of making said agreement the undersigned had a good and sufficient title to the said property without encumbrance of any kind whatsoever, that there are no liens or claims against said property except the rights of the buyer as stated in said agreement and that the undersigned is the sole and unconditional owner of said agreement.

Dated at (Dealer's Town and State)

this day of 192

(Name of Dealer)

By (Officer, Firm Member or Owner)

AUTHORIZED DEALER'S ASSIGNMENT AND GUARANTY OF AGRICULTURAL AND TRACTOR CONTRACTS

(ORIGINAL)

FOR VALUE RECEIVED, the Agreement (on the reverse side) and the note therein mentioned

Between W. G. Campbell and the undersigned, and the property therein described, and all the right, title
(Buyer's Name Here)

and interest therein of the undersigned are hereby sold, assigned and transferred to Commercial Credit Company, San Francisco, Calif., its successors or assigns. The undersigned jointly and severally hereby guarantees full performance of said Agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs and attorney's fees, and agrees to pay the attorney's fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this Agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby agree that in the event of repossession, the entire balance outstanding under such agreement shall become immediately due and payable. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, presentment or protest, which may be required under said Agreement, or note mentioned in same, or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said Agreement shall not in any manner release the undersigned.

Dated this 12th day of November 1924 192

At Seattle (Dealer's Town) State of Wash.

Signed: Howard Motor Company (Dealer) (Seal)

By E. L. Howard (Officer, Firm Member or Owner)

[Title of Court and Cause.]

ANSWER.

Comes now Commercial Credit Company, a corporation, the claimant herein, intervening for its interest in the above-named and described automobile and for answer to the libel of information herein, admits, denies and alleges as follows:

I.

Denies each and every allegation in said libel of information contained and the whole thereof and particularly denies that at the time said automobile was seized the same was being used for the removal or concealment or deposit of intoxicating liquors or any other commodity upon which a tax has been imposed and denies that the same was being used for such purpose or for any other purpose with the intent to defraud the United States of America of such tax or of any tax.

II.

Further answering said libel of information and as an affirmative defense thereto, claimant alleges as follows:

That it is now and at all times herein mentioned, the owner of the legal title to the said automobile and that said [10] automobile prior to the time it was seized had been delivered to one W. G. Campbell under a Conditional Sales Contract, a copy of which is set out in the claim which claimant has filed in this court, to which reference is hereby

made; and that the said W. G. Campbell is in default under the terms of said contract and now has no interest whatsoever in said automobile and that the claimant is the sole owner thereof.

That all and singular the matters and things stated in claimant's claim herein are true.

WHEREFORE, claimant prays that said libel be dismissed, that said automobile be delivered to the claimant and that claimant have its costs and disbursements herein incurred.

JOHN J. KENNETT,
Attorney for Claimant.

State of Washington,
County of King,—ss.

G. T. Harding, being first duly sworn, on oath deposes and says:

That he is the agent of the claimant corporation; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes. That he has authority to and does make this verification for and upon behalf of said claimant.

G. T. HARDING.

Subscribed and sworn to before me this 16th day of December, A. D. 1925.

[Seal] OLIVE S. BARTER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Copy of the within answer received this 16th day of December, 1925.

THOS. P. REVELLE,
U. S. District Atty.
By B. E. MILLER.

[Endorsed]: Filed Dec. 16, 1925. [11]

[Title of Court and Cause.]

STIPULATION THAT AMENDED ANSWER MAY BE FILED.

It is hereby stipulated and agreed between C. T. McKinney, Deputy United States District Attorney, attorney for the libellant, and John J. Kennett, attorney for claimant that the claimant's amended answer attached hereto may be filed in this cause and that an order to that effect may be made by said court.

Dated Seattle, Washington, this 24th day of March, 1926.

C. T. McKINNEY,
Attorney for Libellant.
JOHN J. KENNETT,
Attorney for Claimant.

[Endorsed]: Filed Mar. 24, 1926. [11½]

[Title of Court and Cause.]

ORDER GRANTING LEAVE TO FILE AMENDED ANSWER.

This matter coming on upon the application of the claimant for permission to file an amended answer herein; and it appearing to the Court that the parties hereto have stipulated that the attached amended answer of the Commercial Credit Company, claimant, might be filed,—

IT IS BY THE COURT ORDERED that said amended answer may be filed forthwith herein.

Done in open court this 24th day of March, 1926.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Mar. 24, 1926. [12]

[Title of Court and Cause.]

AMENDED ANSWER OF THE COMMERCIAL CREDIT COMPANY.

Comes now the Commercial Credit Company, a corporation, claimant herein, intervening for its interests in the above-named automobile, and for an amended answer to the libel of information herein, admits, denies and alleges as follows:

I.

Claimant admits that the automobile above described was seized by the Government Prohibition

Agents acting under W. M. Whitney, on or about the 23d day of November, 1925.

II.

As to all and each of the other allegations contained in the said libel of information this claimant has no knowledge or information sufficient to form a belief as to the truth thereof, and, therefore, denies the same and demands that the libellant furnish strict proof thereof. [13]

Further answering said libellant and as an affirmative defense thereto the claimant alleges as follows:

I.

That it is now and was at all times herein mentioned the owner of the legal title to said automobile, and that said automobile prior to the time it was seized had been delivered to one W. C. Campbell (informed against in this case as Leo Oppie) under a Conditional Sales Contract, a copy of which is hereto attached, marked Exhibit "A," and by this reference made a part hereof. That said W. G. Campbell has broken his covenants under said contract and is in default under the terms thereof, and that claimant has elected to forfeit all of said Campbell's right, title and interest in said automobile, and that claimant is sole owner thereof.

II.

That at the time the said automobile was seized from said Campbell there was still owing to the claimant on the purchase price thereof the sum of $101.18, plus interest on delinquent payments, and all of said sum is still due and owing.

III.

That the said W. G. Campbell has been charged under the name of Leo Oppie in the above-entitled court in a certain cause known and designated as United States of America, Plaintiff, vs. Leo Oppie, Defendant, the same being Cause No. 10,223, with the violation of the National Prohibition Act and has been convicted thereof. That the said charge and conviction involved the identical transaction involved in and forming the basis of this libel and that the automobile above described is not subject to forfeiture under the provisions of Section 34,503 Revised Statutes and can only be proceeded against under the forfeiture provisions of Section 26 of the National Prohibition Act. [14] That if said automobile was offending any law of the United States at the time it was seized, it was a National Prohibition Law and should be proceeded against under that Act.

IV.

That at no time prior to the time claimant received notice that said automobile had been seized did claimant have any knowledge that said automobile was used or was intended to be used in any manner in violation of any law of the United States or of any state, and as claimant is informed and verily believes its assignors did not know or have any knowledge prior to the time said automobile was seized that said automobile was intended to be used in any manner in violation of any law of the United States or of any state, and that claimant is

entitled to the return of said automobile under Section 26 of the National Prohibition Act.

WHEREFORE having fully answered claimant prays that said libel be dismissed and that said automobile be delivered to the claimant and that claimant have its costs and disbursements herein.

JOHN J. KENNETT,
Attorney for Claimant.

United States of America,
Western District of Washington,
Northern Division,—ss.

J. H. Lewis, being first duly sworn upon his oath deposes and says: That he is the agent of Claimant corporation, that he has read the foregoing amended answer, knows the contents thereof and that the same is true as he verily believes and that he has authority to and does make this verification for and upon behalf of said claimant.

J. H. LEWIS.

Subscribed and sworn to before me this 24th day of March, 1926.

[Seal] OLIVE S. BARTER,
Notary Public in and for the State of Washington,
Residing at Seattle. [15]

Form 209—3M sets—3-24

ARIZONA, IDAHO, MONTANA, NEVADA, OREGON, UTAH, WASHINGTON
(Agreement Must Be Filed in Arizona, Montana and Washington)

42750

WITHOUT RECOURSE
CONDITIONAL SALE AGREEMENT

ORIGINAL

This Agreement, made this 14th day of November, 1924, between HOWARD MOTOR COMPANY (Dealer's Name) of SEATTLE WASH. (Dealer's Address) first party, his or its successors, or assigns (hereinafter called "Seller"), and W. G. Campbell (Buyer's Name) at Humphrey Apts., 2205 2nd Ave., Seattle, Wash. (Buyer's Street Address) (Buyer's Town and State) second party (hereinafter called "Buyer")

WITNESSETH:—THAT the Seller in consideration of the payments, agreements and conditions contained herein which on the part of the Buyer are to be made, done and performed, has this day delivered and agreed to sell and the Buyer has this day agreed to buy from the Seller, but upon the conditions hereinafter recited, to the Buyer the following Passenger or Commercial Car, or Tractor hereinafter called the "Car":

MAKE	Type of Body	Model Letter or Number	Manufacturer's Serial No.	Motor No.	No. Cylinders	Advertised Horse Power	If Truck Tons Capacity	Year Model	List Price F.O.B. Factory	Selling Price
Ford	Coupe	T	10587243		4	20		1924	525.	630.

with extra equipment, etc., for the sum of Seven Hundred Eighty-eight & 94/100 (Total Cost to Buyer) Dollars ($ 788.94).

The Buyer has this day paid to the Seller One Hundred Eighty-one & 75/100 (Total Payment Made) Dollars ($ 181.75).

and the Buyer agrees to pay to the Seller, or order, Six Hundred Seven & 19/100 (Total Balance to Be Paid) Dollars ($ 607.19).

balance, payable in 12 installments of $ 50.59 each, on the 14th day of each succeeding month, which installments shall bear interest after maturity until paid at the highest legal contract rate and are to be evidenced by a promissory note (not as payment, but as evidence of the amounts to become due hereunder) made by the Buyer to the order of the Seller, bearing date hereof, and maturing on the due dates of said respective installments. Any extensions or assignments of this Agreement or said note shall not waive any condition herein contained.

Title to the Car and extra equipment shall not pass by delivery to the Buyer but shall remain vested in and be the property of the Seller or Assigns until the purchase price has been fully paid. Buyer agrees to operate and control said Car in conformity with all Laws and Ordinances and to indemnify and save harmless the Seller from any and all loss, or damage to persons or property caused by said Car or by the use and operation thereof to which the Seller might possibly be subjected.

Buyer agrees and acknowledges that the within contract covers all conditions and agreements between the parties, that the loss, injury or destruction of said Car shall not release said Buyer from payment as provided herein. Buyer hereby acknowledges receipt of and accepts the Car, having first examined and tested the same and found same in sound and first class condition, and agrees to keep the Car insured against loss by fire, theft, conversion and confiscation with insurance companies acceptable to the Seller for not less than the amount owing, and until fully paid, payable to and to protect the interest of the Seller or Seller's Assigns, and the Seller or Seller's Assigns may place, continue and renew such insurance for the Buyer at the Buyer's expense if the Seller or Assigns so elects, and cost of such insurance shall become a part of the Buyer's obligation hereunder.

Buyer agrees to pay all taxes that may be assessed upon the property described herein or his license fees or charges against said Car and to keep same in good condition, and that any equipment, repairs or accessories placed upon said Car shall be at Buyer's expense and become a component part thereof and included in the terms of this Agreement. Buyer further agrees not to use or permit said Car to be used for passenger hire.

Buyer further agrees that he will not use or cause or permit to be used the car, truck or tractor herein mentioned for the transportation of liquor, wines or any other beverage, for personal or commercial use, prohibited by any Federal or State statute to be transported, and it is hereby agreed that should the car, truck or tractor hereinbefore described be used for such purpose or any other unlawful purpose, it shall be considered as a default under the agreement, whether or not there shall be a default under any other terms or conditions thereof, which shall entitle the holder hereof to immediate and continued possession of the car, truck or tractor herein described.

Buyer agrees that in the event of any law or ordinance requiring the recordation of this Agreement, that it shall be recorded at the expense of the Buyer and in his name, and at any time, by the Seller, or the holder of this Agreement.

Should the Buyer fail to keep and perform any or all his agreements herein contained, and to promptly pay at maturity any and all sums hereunder, or if said Car is removed or attempted to be removed from the State in which the Buyer now resides, or to be otherwise disposed of, or if Buyer shall lend, sell or encumber, or shall attempt to sell or encumber said Car or in case of misuse or abuse thereof, or whenever the Seller or his assign shall deem the debt insecure, said Seller may without any demand or notice take possession of said Car and equipments, wherever found and without process of law. Buyer does hereby expressly waive any right of action against the Seller growing out of the removal, repossession or retention of said Car or otherwise, and hereby consents that upon any default (or in the event that the Buyer, for any reason gives up or loses possession of the Car), all unpaid balance of said purchase price shall forthwith become due and payable at the option of the Seller or Seller's assigns. Buyer agrees that all payments made shall belong to and be retained by Seller as liquidated damages for the nonfulfillment of this Agreement, for loss in value of the Car, and for the rental value thereof.

Seller may, by suit or otherwise, enforce payment of said note, and no legal proceedings with respect thereto shall be deemed any waiver of said right of Seller to take possession on default or breach as aforesaid. Upon the Seller so taking possession of the Car, Seller may sell the Car at public or private sale at any time thereafter without any notice to the Buyer, and said Seller may become the purchaser thereof, and if the proceeds thereof are insufficient to pay all sums remaining unpaid hereunder and the expense caused by such repossession, removal, reparation, storage, liens and sale, including all collection expense and a reasonable attorney's fee, incurred in taking possession of said Car, or in or about the sale thereof, or in collecting in any manner any sums which may be due and owing hereunder, Buyer agrees to pay any deficiency as damages for use of said property. The waiver or indulgence of any default shall not operate as a waiver of subsequent defaults.

Buyer agrees that said Seller, in case said Buyer fails to comply with any of the agreements aforesaid on Buyer's part to be performed, may, at Seller's option, cause judgment to be entered against said Buyer upon this agreement for the whole amount unpaid, or upon the said note, interest and costs, whether or not the same shall have become due and payable by reason of maturity or under the conditions of this agreement, and said Buyer hereby waives [illegible] day of grace, exemption laws, right of inquisition on real estate, errors and appeals, and further authorizes any attorney of any Court of Record as his lawful attorney to appear for and confess judgment against said Buyer, and in such event the Buyer hereby agrees to pay a reasonable attorney fee. Time is of the essence of this agreement.

This agreement shall apply to and bind the heirs, executors, administrators and assigns of the Buyer, and shall inure to the benefit of the Seller, Seller's heirs, executors, administrators, successors and assigns, and contains the entire agreement between the parties hereto, their agents or employees, either verbal or written.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this Agreement, in triplicate, the day and year first above written.

NOT A COPY

WITNESS: E. E. Pinkman

Address 4723-49th N.E.

W. G. Campbell (Buyer Sign Here) (Seal)

By _____ (Owner, Officer or Firm Member) (Seal)

WITNESS: _____

Address _____

HOWARD MOTOR COMPANY (Dealer Sign Here) (Seal)

By E. L. Howard (Owner, Officer or Firm Member) (Seal)

16

Dealer Must Sign Assignments on Reverse Side

(ORIGINAL)
(DUPLICATE)

BUYER'S STATEMENT

Town S. ttle. Wash. State Date Nov. 14, 1 4 192

HOWARD MOTOR COMPANY and to COMMERCIAL CREDIT COMPANY, San Francisco, Calif.
(Manufacturer, Distributor or Dealer)

For the purpose of securing credit from you on my (our) obligation hereto attached, given per statement herein, for a new Ford (Passenger or Commercial Car or Tractor), delivery and receipt of which is hereby acknowledged, I (we) hereby warrant that: I (we) can meet the payments provided for in said obligation as they become due, and I (we) covenant not to sell, trade, encumber or give up possession of the car, truck or tractor, and that same will not be used for passenger hire without your written consent until paid for in full.

MY PRESENT BUSINESS, PROFESSION OR POSITION IS Broker I have been so employed 3 Years

Name and Address of Present Employer myself I HAVE BEEN IN PRESENT POSITION 3 YEARS

Age 39 Married yes Number of Dependents none Monthly Salary or Income $ 150.00 per mo.

Bank Account with Seattle National Bank of Seattle, Wash. Town Checking a/c State.

If you do not live in your own home give name and address of Landlord: Robt. Smart, 2nd & Blanchard

Have bought on credit from or other business references:
Name G. English — Address Norman Garage 2035 3rd Ave.
Name H.C.McLaughlin — Address 4411 Meridian Ave
Name — Address

Description and location of Real Estate or Personal Property owned in my (our) name:

Description	Location	Cash Value	Owing on Same
		$	$
		$	$

Is the Passenger or Commercial Car or Tractor NEW OR USED? new For Pleasure, Hire, or Business Use? pleasure

What make Passenger or Commercial Car or Tractor have you owned other than this car? Ford If purchased on time, through what Dealer? W. O. McKay Co., What Credit Company or Bank? P.S. Savings & Loan

I carry Life Insurance for $ none with Company of

Statement of Items covering Buyer's obligation given for new Passenger or Commercial Car or Tractor

Delivered Cash Price of Passenger or Commercial Car or Tractor (or Truck or Chassis) $ 632.89

Items	
Shaddow Bar & Dash light	19.50
Bumper, cowl, radiator protector, etc.	15.50
Bailey Brakes	25.00
Changing gas tank to rear	7.50
Insurance, filing fee & bond	26.55
Cash Selling Price	$ 726.94
Services, Expenses and Interest (See Rate Sheet)	62.00
Total Cost to Buyer on Time	$ 788.94
Less: Allowance, if any, on "Trade in"	
CASH PAYMENT 1/4th	181.75
Balance in 12 Monthly Payments	$ 607.19

WITNESS

Address

ADDRESS OF BUYER: Telephone No.
Humphries Apts.,
Residence Street or R. F. D. No.
2205 2nd Ave.,
Town Seattle State Wash.

How long have you lived here? five Years

Business Address Street or R. F. D. No.

Town State

Remarks

Signed W. G. Campbell
(Buyer)

By
(Owner, Firm Member or Officer)

AUTHORIZED DEALER'S ASSIGNMENT COVERING MONTHLY PAYMENT CONTRACTS EXCLUDING ~~AGRICULTURAL AND TRACTOR~~ CONTRACTS

(Original) (DUPLICATE)

WITH RECOURSE

FOR VALUE RECEIVED, the within agreement between and the undersigned, and all right, title and interest of the undersigned in and to the property therein described, together with all moneys due, or to become due and payable thereunder, are hereby sold, assigned, transferred and set over by the undersigned to COMMERCIAL CREDIT COMPANY, San Francisco, California, its successors and assigns.

The undersigned warrants that said agreement was made in good faith and was actually signed by the person or persons named therein as the buyer; that the property is correctly described therein and has been actually delivered in good faith to the buyer therein named; that at the time of making said agreement the undersigned had a good and sufficient title to the said property without encumbrance of any kind whatsoever, that there are no liens or claims against said property except the rights of the buyer as stated in said agreement and that the undersigned is the sole and unconditional owner of said agreement.

Dated at
(Dealer's Town and State)

this day of 192

(Name of Dealer)

By
(Officer, Firm Member or Owner)

AUTHORIZED DEALER'S ASSIGNMENT AND GUARANTY OF ~~AGRICULTURAL AND TRACTOR~~ CONTRACTS

(Original) (DUPLICATE)

WITH RECOURSE

FOR VALUE RECEIVED, the Agreement (on the reverse side) and the note therein mentioned

Between W. G. Campbell and the undersigned, and the property therein described, and all the right, title
(Buyer's Name Here)

and interest therein of the undersigned are hereby sold, assigned and transferred to Commercial Credit Company, San Francisco, Calif., its successors or assigns. The undersigned jointly and severally hereby guarantees full performance of said Agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs and attorney's fees, and agrees to pay the attorney's fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this Agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby agree that in the event of repossession, the entire balance outstanding under such agreement shall become immediately due and payable. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, presentment or protest, which may be required under said Agreement, or note mentioned in same, or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said Agreement shall not in any manner release the undersigned.

Dated this 14th day of November 192 4

At SEATTLE State of WASH.
(Dealer's Town)

Signed: HOWARD MOTOR COMPANY (Seal)
(Dealer)

By E. L. Howard
(Officer, Firm Member or Owner)

[Title of Court and Cause.]

STIPULATION AND ORDER WAIVING JURY TRIAL NUNC PRO TUNC.

The parties hereto stipulate in the above cause to waive a jury trial and to try said cause to the Court pursuant with the terms and provisions of Section 649 and 700 of the Revised Statutes of the United States.

In witness whereof the parties have hereunto set their hands and seals this 10th day of April, 1926.

THOS. P. REVELLE and
ARTHUR E. SIMON,
Attorneys for Libellant.
JOHN J. KENNETT,
Attorney for Claimant.

ORDER.

Upon application of the parties hereto for an order permitting the foregoing stipulation to be entered *nunc pro tunc* under the date of March 29th, 1926; and the Court being duly advised in the premises,—

IT IS ORDERED that the above stipulation may be filed by the clerk *nunc pro tunc* under the date of March 29th, 1926.

Done at chambers this 10th day of April, 1926.

BOURQUIN,
Judge.

[Endorsed]: Filed Apr. 10, 1926. [17]

[Title of Court and Cause.]

TESTIMONY.

BE IT REMEMBERED that heretofore and on, to wit, March 29, 1926, the above-entitled cause came regularly on for trial in the above court, and before the Honorable George M. Bourquin, United States District Judge, sitting in the above-entitled court without a jury;

The libellant appearing by Mr. Arthur E. Simon, Assistant United States Attorney, its attorney and counsel;

The claimant appearing by Mr. John J. Kennett, its attorney and counsel;

AND THEREUPON the following proceedings were had and done, to wit: [18]

Mr. SIMON.—This likewise is a proceeding for forfeiture under Section 3450 of the Revised Statutes, if the Court please.

The COURT.—Call your witness.

TESTIMONY OF MATTHEW RYAN, FOR THE UNITED STATES.

MATTHEW RYAN, called as a witness on behalf of the libellant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SIMON.)

Q. What is your name? A. Matthew Ryan.

Q. What is your occupation?

A. United States Customs Inspector.

(Testimony of Matthew Ryan.)

Q. How long have you been engaged in that?

A. About two years and six months.

Q. In your employment in that capacity did you have occasion to seize one Ford coupe, motor number 10587243, the subject of this proceeding?

A. Yes, sir.

Q. Will you state to the Court the circumstances under which you made that seizure?

A. Why, the coupe was reported to me as handling a lot of Canadian liquor, distributing it around town, and I had watched it a couple of times before I seized it make deliveries. It belonged to a man who lived up on Summit Avenue North about the 400 block. He used to park it in the alley back of his house and—so one evening I was coming by, I think it was the 9th of [19] October.

Q. The 9th of October of last year?

A. Yes. And I decided to stop and catch him, so Inspector McTague was with me and we stopped there and he came out of the house and looked around and got into the coupe and started the motor and started to back out of the alley and I stopped him and told him I would like to search his car, told him who I was, and he says, "All right," so we opened up the back end of it and there was no liquor in there, we opend up the front door and the seat, there was only one seat in the car, the right-hand side was on a hinge and it was cut in the middle and just lifted up on a hinge, and there was thirteen quarts of liquor under the seat, so I ar-

(Testimony of Matthew Ryan.)

rested him and took him down to the immigration station and put the car in the appraisals warehouse.

Q. What kind of liquor was this?

A. I think there was three quarts of gin and ten quarts of whiskey.

Q. Did the bottles contain revenue stamps showing tax paid to the United States? A. No, sir.

Q. You took the car into your possession at that time? A. Yes, sir.

Mr. SIMON.—That is all.

Cross-examination.

(By Mr. KENNETT.)

Q. Whereabouts was this seizure made?

A. It was on Summit Avenue North between—let me see—I [20] think it is between Summit and Belmont. It is up the side street there. Harrison Street, I believe.

The COURT.—This city, Witness?

The WITNESS.—Yes.

Q. Had you been trailing this car that day before you made the seizure?

A. Yes, I had watched that day, but several days previous I had watched it.

Q. You don't know how long that liquor had been in the car?

A. Well, the appearance of it was that he kept quite a bit in there. There was a lot of papers, wrappers and stuff like that, showing he had been using it quite a bit.

Q. Was that liquor fit for beverage purposes?

(Testimony of Matthew Ryan.)

A. Yes, sir.

Q. And the largest container of any of them—they were all quart bottles, I understand?

A. All quart bottles, yes, sir.

Mr. KENNETT.—That is all.

The COURT.—What kind of liquor was it; local or—

The WITNESS.—No, sir; there was three quarts of Old Pensioner Gin that were supposed to be the produce of England, and six quarts of Perfection Scotch Whiskey, and three quarts of Dunbar's Gold Label Scotch Whiskey, and one quart of Cato's Gold Scotch Whiskey.

The COURT.—What do you mean by Scotch Whiskey?

A. That is what is said on the bottle.

The COURT.—Did it give any name of the maker?

The WITNESS.—Yes, sir.

The COURT.—What were they?

The WITNESS.—Well, this Dunbar's was supposed to be made in [21] Scotland. It said on the bottle "Produce of Scotland," and the same way with the Perfection. I don't remember the names of the makers, but the Prohibition Department has the evidence.

The COURT.—Very well.

Q. Did you make any investigation to ascertain whether or not those were genuine liquors or whether they were moonshine and fake labels?

A. No, sir, I did not.

(Testimony of Matthew Ryan.)

Q. You don't know, as a matter of fact, whether those liquors were manufactured and produced abroad, do you?

A. No, sir, on what it said on the bottle.

Mr. KENNETT.—That is all.

(Witness excused.)

TESTIMONY OF W. M. WHITNEY FOR LIBELLANT.

W. M. WHITNEY, called as a witness on behalf of the libellant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SIMON.)

Q. State your name to the Court, please.

A. W. M. Whitney.

Q. What is your position with the United States?

A. I am a regularly appointed Deputy Collector of Internal Revenue of this state as well as Assistant Prohibition Administrator for this district.

Q. Were you such on the 9th day of October, 1925? A. Yes, sir. [22]

Q. Do you know whether the tax has been paid on the thirteen quarts of liquor described in this complaint?

A. It was not paid in this district. I searched the records.

Mr. SIMON.—That is all.

(Testimony of W. M. Whitney.)

Cross-examination.

(By Mr. KENNETT.)

Q. When did you search the records, Mr. Whitney? A. Along early in January.

Q. How is there any way of identifying whether there has been any tax paid on this particular liquor?

A. There has been no tax paid on any liquor within the last four years.

Q. That is on any beverage liquor; in fact you can't pay a tax on beverage liquor that is imported from abroad, can you?

A. We can, as far as the revenue office is concerned.

Q. Where is the tax supposed to be paid on imported liquors?

A. It will be paid in this district if it is brought in this district. If it is cleared through the Customs Office, the Collector of Customs will collect not only the customs duty but the internal revenue duty.

Q. If that liquor had been imported from a foreign country and come into the United States in some other district other than the district of which you are an officer, you would have no record of the payment, would you?

A. There would be a stamp on it.

Q. The records that you examined would not disclose that tax had been paid? [23]

A. No, but I examined the bottles and there were no stamps on the bottles.

(Testimony of W. M. Whitney.)

The COURT.—Can any liquors be imported now lawfully?

The WITNESS.—Not without a permit.

The COURT.—Can it be with a permit?

The WITNESS.—There can be with a permit, if the Federal Prohibition Commissioner should certify that the quantity of liquor held for nonbeverage purposes in this country was too low.

The COURT.—For nonbeverage purposes?

The WITNESS.—For nonbeverage purposes.

The COURT.—I thought it was prohibited altogether.

The WITNESS.—It is, your Honor. About three years ago the Prohibition Commissioner, with the approval of the Internal Revenue Commissioner, issued an order or a regulation, which has the effect of law until changed, that the quantity of liquor in the United States was sufficient for all purposes until further order and that stands now and no permit is now given for importing liquor, but it could be gotten with an order just like sacramental wines. They can import sacramental wines because there is an order by the Internal Revenue Commissioner that there is not sufficient sacramental wines to fill the requirements for nonbeverage purposes but in any event there would have to be an order signed by the Commissioner.

The COURT.—It seems to me a long while back there was no law of any kind.

The WITNESS.—It has the effect of law.

The COURT.—It is not law unless the statute

(Testimony of Kenneth Moore.)

permits it. [24] Every administrative officer can make regulations consistent with the law.

The WITNESS.—Yes.

The COURT.—Very well. We will take it so.

(Witness excused.)

Mr. SIMON.—If the Court please, it is stipulated between myself and counsel that Customs Inspector McTague would testify as Inspector Ryan has testified.

The COURT.—Very well.

Mr. KENNETT.—It is further stipulated as a part of the claimant's case between the counsel for the Government and myself that the man driving this car, W. G. Campbell, was charged under the National Prohibition Law in cause number 10223 of the records of this court with unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved.

Mr. SIMON.—It is so stipulated.

Mr. KENNETT.—I will call Mr. Moore.

TESTIMONY OF KENNETH MOORE, FOR CLAIMANT.

KENNETH MOORE, called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KENNETT.)

Q. Your name is Kenneth Moore? [25]

A. Yes, sir.

(Testimony of Kenneth Moore.)

Q. You are branch manager of the Commercial Credit Company, the claimant in this case?

A. Assistant branch manager.

Q. Were you on or about the 9th of October the owner of the Ford automobile involved in this case?

A. Yes, sir.

Q. I will hand you a document which will be marked as Claimant's Exhibit "A" for identification, and ask you that that is?

A. This is another form of our Conditional Sales Contract.

Q. Is that the contract through which you claim title to this automobile? A. Yes, sir.

Q. That was duly assigned on the back?

A. Yes, sir.

Q. You paid value for it? A. Yes, sir.

Mr. KENNETT.—I offer it in evidence.

Mr. SIMON.—I object to it.

The COURT.—It will be admitted over objection and exception noted and it will not be given any more consideration than it is entitled to.

(Paper referred to admitted in evidence and marked Claimant's Exhibit "A.")

Q. That contract provides that the interest of the purchaser in the automobile shall be forfeited in the event it is used for the transportation of intoxicating liquor? A. Yes, sir. [26]

Mr. SIMON.—The same objection.

The COURT.—The same ruling.

Q. And you have elected to forfeit the car as to the interest of the purchaser? A. Yes, sir.

(Testimony of Kenneth Moore.)

Q. At the time you sold this automobile or any time prior to the time it was seized by the United States Government did you or any officer of your company have any knowledge that the automobile was being used for the possession or transportation of intoxicating liquors?

Mr. SIMON.—The same objection.

The COURT.—The same ruling.

A. No, sir.

Q. Did you make an investigation? You buy the paper on these automobiles, do you?

A. Yes, I made our usual investigation.

Q. You made an investigation to ascertain. Did that investigation disclose that this man was engaged in any illegal business? A. No, sir.

Mr. SIMON.—The same objection.

The COURT.—The same ruling.

Q. At the time this automobile was seized how much was still due on your conditional sales contract? A. About $181.

Q. Aren't you in error about that; wasn't it $101, the amount set out in the claimant's answer?

A. $101.

Mr. KENNETT.—That is the correct amount. Cross-examine. [27]

Cross-examination.

(By Mr. SIMON.)

Q. Did you make any inquiry of the Prohibition Office concerning the record of this man at the time he bought this?

(Testimony of Kenneth Moore.)

A. I don't believe so, unless the file discloses that one of the prohibition officers was given as a reference.

Q. Do you or did your vendors or assignors have any confiscation insurance on this? A. No, sir.

Mr. SIMON.—That is all.

Mr. KENNETT.—That is all.

(Witness excused.)

The COURT.—Anything further?

Mr. KENNETT.—Nothing further, your Honor.

The COURT.—It will be submitted together with the other?

Mr. KENNETT.—May I make a motion just for the purpose of the record?

The COURT.—You may.

Mr. KENNETT.—I now move to dismiss the Government's libel on the following grounds: First, that there is not tax at this time levied or collectible under the laws of the United States on beverage liquor—against liquor being imported fit for beverage purposes; second, that the Government not having stated this was for nonbeverage purposes in their libel cannot now claim a tax on nonbeverage liquor that is being imported; third, that the [28] Government has wholly failed to prove that there has no tax been paid on this liquor, for the reason that under the law liquor in any container less than five gallons is presumed tax paid; further for the reason that the Government has elected to proceed under the National Prohibition Act, this car was convicted at the same time the individual was, and

that the Government is now barred from further prosecution for the same act; for the next reason that Section 3450 of the Internal Revenue Act has been repealed in so far as it relates to the transportation or possession of intoxicating liquors by the enactment of the National Prohibition Act, and the Willis Campbell Act.

The COURT.—The motion and the whole case is taken under advisement.

Mr. KENNETT.—May I submit one brief in both cases, your Honor?

The COURT.—You may. [29]

[Title of Court and Cause.]

STIPULATION AS TO TRANSCRIPT OF EVIDENCE.

It is hereby stipulated by and between the United States of America, libellant through its proctor Thomas P. Revelle, and Paul D. Coles, and the Commercial Credit Company, a corporation, claimant through John J. Kennett, its proctor, that the foregoing statement, report and transcript of the trial of the above-entitled cause is a full, true, complete and properly prepared statement, report and transcript of all the evidence introduced upon the trial of said cause at the hearing on the merits in the above-entitled court at Seattle, King County, Washington, on the 29th day of March, 1926, before the Honorable George M. Bourquin, one of the Judges of said court, together with all objections

and exceptions made and taken to the admission or exclusion of evidence, and all motions and rulings by the Court thereon made upon said trial together with Claimant's Exhibit *No.* "A" (Conditional Sales Contract), and that no certificate of the trial judge of said statement, report and transcript shall be required.

Dated at Seattle, Washington, this 17 day of June, 1926.

THOS. P. REVELLE.
THOMAS P. REVELLE,
United States District Attorney.
By PAUL D. COLES,
Proctor for Libellant.

JOHN J. KENNETT,
Proctor for Claimant.

[Endorsed]: Filed Jun. 18, 1926. [30]

United States District Court, Washington.

No. 10,048.

U. S.
vs.
ONE GARDNER COACH.

No. 10,183.

U. S.
vs.
ONE FORD COUPE.

DECISIONS.

These cases are libels to forfeit the autos for that they were "used in the removal, and for the deposit and concealment of a large quantity of distilled spirits * * * with intent to defraud the United States" of taxes thereon due and unpaid. As claimant, appears only the Commercial Credit Company, assignee of the conditional sale contracts by virtue of which the persons using the cars as aforesaid were in possession of them as vendees in default.

The plaintiff counts upon the internal revenue statute, section 3450, R. S. and in the Ford Car case, §§ 5763, 5764, 5765, Comp. Stats. (Wests), also apply; and all of which provide for forfeiture of vehicles in the circumstances by plaintiff herein alleged.

The plaintiff contends that said section is in direct conflict with the N. P. A., and in consequence is repealed.

There is *precedent* to support both, but *authority* (quite a different thing, as mere *precedent* literally can be found for anything) maintains the case of plaintiff. See

U. S. vs. One Studebaker, 4 Fed. (2) 534;
U. S. vs. White Truck, 4 Fed. (2) 413;
U. S. vs. Chevrolet Truck, 4 Fed. (2) 612.

Also U. S. vs. Autos, 291 Fed. 479;
U. S vs. One Cole, 273 Fed. 935. [31]

In the last case cited, is pointed out that the offenses denounced by § 3450 and those by the N. P. A. are as different as things unlike are different; that the offense of either statute can be committed tho at the same time the command of the other be strictly obeyed.

Advertising to the evidence, in October, 1925, the Gardner car was seized in Seattle, while engaged in the removal of 7 gallon bottles filled with "moonshine" whiskey in it deposited and concealed, the bottles without revenue stamps. Everybody knows that federal statutes impose taxes upon all whiskey made; that the tax attaches and is due when the whiskey comes into being (§ 3248, R. S.); that upon "moonshine" whiskey, whenever the tax is paid or the whiskey seized for nonpayment, the liquor is confiscated and destroyed; that upon any found in private hands, the tax is indisputably due owing and unpaid. And as any offense may be committed with several intents, it is an irresistible inference that he who in an auto removes, deposits, and conceals said whiskey, whatever else he intends, he also intends to defraud as he is defrauding the United States of said tax,—the inevitable consequences of his voluntary acts done with the knowledge aforesaid. Also in October, 1925, the Ford car was seized in Seattle, while engaged in transporting quart bottles filled with liquor,—3 with gin, 10 with whiskey, fit for beverage purposes, all of foreign manufacture or brands or labels so representing, the bottles without revenue stamps of any kind.

In the light of all circumstances, viz., a seaport near Canadian line, smuggling of liquors, foreign brands and labels, hearsay to plaintiff's agents that the auto driver was handling smuggled liquors, watched several deliveries prior to the instant seizure, illicit in so far that the driver was subsequently convicted for illegal possession, no taxes paid on imported liquors in this collection district in four years, and had any been elsewhere paid [32] the bottles would have borne stamps accordingly, beverage liquors, the just inference is that these were smuggled liquors. There is probable cause to so believe. And thereby the burden to prove otherwise, to prove that customs taxes which attach when goods enter the country (Meredith vs. U. S., 13 Pet. 493) were paid, is upon the claimant and by it has not been sustained. See

Section 615, Tariff Act 1922, 42 Stat. 987;

U. S. vs. One Oakland, 9 Fed. (2) 635.

Moreover, if the liquors are domestic in masquerade, the comment in respect to the Gardner car applies.

The plaintiff's cases are made. Decree of forfeiture in both.

This decision can be filed in one, and proper entry of reference to it, in the other. Claimant's motions to dismiss, both cases, are denied.

March 31, 1926.

BOURQUIN, J. [33]

[Title of Court and Cause.]

CLAIMANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter having come on regularly for trial on the 29th day of March, 1926, before the Honorable George M. Bourquin, United States District Judge, sitting without a jury, and the libellant and Commercial Credit Company, claimant having both submitted all of their testimony; and the Court having thereafter taken the matter under advisement, and being now fully advised in the premises; does now make the following:

FINDINGS OF FACT:

I.

The Court finds that on or about the 23d day of November, 1925, certain United States Prohibition Agents searched the automobile proceeded against herein and found therein contained three quart bottles of gin and ten quart bottles of whiskey, all which was fit for beverage purposes. The Court also finds that all of said liquors had on them brands or labels, representing that they were of a foreign manufacture. [34]

II.

The Court finds that no revenue stamps of any kind were attached to any of said bottles. That no Customs Tax has been paid on any imported liquors in this Collection District during the last four years.

III.

The Court finds that just prior to the time the said automobile was searched the same had been in motion and that said liquors were in said automobile while the same was in motion.

IV.

The Court finds that there is no proof in the record as to who brought said liquors into the United States.

V.

The Court finds that the Commercial Credit Company, a corporation, duly filed a claim, bond and answer in the above-entitled matter claiming that they were owners in good faith of the legal title to said automobile.

VI.

The Court finds that the automobile herein proceeded against had prior to the time it was seized been sold and delivered to one W. G. Campbell (informed against in this case as Leo Oppie) by the Howard Motor Company on a Conditional Sales Contract, and that thereafter on the same day and prior to the seizure herein claimant had for value purchased the said Conditional Sales Contract, and from that time on up to and including the time of said seizure claimant was and is now the owner of the legal title to said automobile.

VII.

The Court finds that said contract contained a clause providing for the forfeiture of the vendee's interest in said automobile [35] if the same was

used in violation of any of the laws of the United States pertaining to the transportation of intoxicating liquors, and that claimant, upon being notified of the seizure of said automobile, elected to forfeit all of Campbell's right, title and interest in and to said automobile.

VIII.

The Court finds that W. G. Campbell informed against herein as Leo Oppie, has no interest of any kind in said automobile.

IX.

The Court finds that said W. G. Campbell has been charged under the name of Leo Oppie in the above-entitled court in a certain cause known and designated as United States of America, plaintiff, vs. Leo Oppie, defendant, the same being Cause No. 10,223, with a violation of the National Prohibition Act, and has by said Court been convicted of unlawful possession of intoxicating liquors. The said charge and conviction involved the identical transaction involved in and forming the basis of this libel, and that the automobile involved herein was used in possessing the said liquors.

X.

The Court finds that at no time prior to the time claimant received notice that said automobile had been seized, did claimant have any knowledge that said automobile was used or was intended to be used in any manner in violation of any laws of the United States, or of any state.

XI.

The Court finds that before purchasing the Conditional Sales Contract under which they claim, claimant made investigation from various parties as to the character of W. G. Campbell and receive no information from any of them, which would lead them to believe said [36] automobile was to be used in violation of the National Prohibition Act, or any other law.

Done in open court this 10th day of April, 1926.

_____,

Judge.

The Court having heretofore entered its findings of fact, now enters the following.

CONCLUSIONS OF LAW:

I.

The Court concludes that libellant has failed as a matter of law to prove that a tax had not been paid upon the liquors found in the above-described automobile.

II.

The Court concludes that libellant having proceeded against the individuals who were operating the automobile under the National Prohibition Act are now as a matter of law estopped and barred from proceeding against the automobile herein described under the provisions of Section 3450 of the Revised Statutes.

III.

The Court concludes that libelant has as a matter of law failed to prove that there was any tax due

upon the liquors found in the automobile herein described.

IV.

The Court concludes that the bond which the claimant filed herein to obtain release of said automobile should be exonerated and the claimant and its sureties should be fully discharged and exonerated from any liability thereon. [37]

V.

The Court concludes that this libel should be dismissed.

Done in open court this 10th day of April, 1926.

_____,

Judge.

Refused, because an admiralty case. Findings unnecessary. Full review of evidence without.

BOURQUIN, J.

[Endorsed]: Filed Apr. 10, 1926. [38]

[Title of Court and Cause.]

CLAIMANT'S PROPOSED JUDGMENT OF DISMISSAL.

This matter having heretofore come on regularly for trial the Honorable George M. Bourquin, United States District Judge, sitting without a jury, and the libellant and claimant having both submitted all of their testimony; and the Court having heretofore made and entered its findings of fact and conclusions of law, in which it found and concluded that the libel herein should be dismissed, and the said

automobile ordered returned to the claimant; and the Court being otherwise fully advised in the premises;

DOES NOW ORDER:

(1) That this libel be dismissed.

(2) That the bond filed herein in place of the automobile be and the same is hereby exonerated and fully discharged, and the claimant and its sureties released from all liability thereon.

This 15th day of April, 1926.

_____,

Judge.

Claimant excepts to Court's refusal to sign this judgment this —— day of April, 1926.

JOHN J. KENNETT,
Atty. for Claimant.

[Endorsed]: Filed Apr. 10, 1926. [39]

United States District Court, Western District of Washington, Northern Division.

No. 10183.

UNITED STATES OF AMERICA,
Libellant,

vs.

ONE FORD COUPE, Motor No. 10587243, Washington License No. 274864, and Tools and Accessories, and LEO OPPIE,
Respondent.

COMMERCIAL CREDIT COMPANY, a Corporation,
Claimant.

DECREE.

This matter having come on duly and regularly to be heard on the 29th day of March, 1926, libellant appearing by its attorneys Thos. P. Revelle, United States Attorney for the Western District of Washington, and Paul D. Coles, Assistant United States Attorney for said district, and respondent and claimant having appeared in person and by their attorney John J. Kennett, and evidence having been introduced on behalf of the libellant and claimant, at the conclusion of which evidence, the claimant made a motion to dismiss the said libel, which was taken under advisement by the Court, and this Court being duly advised in the premises, and having on the first day of April rendered its decision for the forfeiture of said automobile to the United States; it is hereby

ORDERED, ADJUDGED and DECREED, that the motion to dismiss be denied; that the said Ford Coupe, Motor No. 10587243, Washington License No. 274864, and tools and accessories, heretofore in the custody of the United States Marshal, be, and the same is hereby condemned and forfeited to the United States, and ordered to be forthwith [40] sold; that a writ of *venditioni exponas* be issued forthwith for the sale of said automobile, and that the Marshal pay the net proceeds of said sale to the Clerk of the above-entitled court, after deducting his fees.

This 20 day of April, 1926.

BOURQUIN,
United States District Judge.

Approved as to form.

JOHN J. KENNETT,
Attorney for Respondent.

Claimant excepts to the entry of this decree and each and every part thereof this 20th day of April, 1926.

JOHN J. KENNETT,
Atty. for Claimant.

[Endorsed]: Filed May 5, 1926. [41]

[Title of Court and Cause.]

ORDER STAYING PROCEEDINGS ON JUDGMENT AND DECREE HEREIN.

It appearing to the Court that libellant and claimant have stipulated in writing that the judgment and decree entered in the above cause on the 5th day of May, 1926, might be superseded and all proceedings thereon stayed, without the filing of a supersedeas bond, pending an appeal to the United States Circuit Court of Appeals and the Court being otherwise fully advised in the premises:

Does now order that said judgment and decree be and the same is hereby superseded and all proceedings thereon are hereby stayed pending an appeal to the United States Court of Appeals without filing a supersedeas bond.

Done in open court this 13th day of May, 1926.

NETERER,
Judge.

[Endorsed]: Filed May 13, 1926. [42]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the United States of America, Libellant, and to Thomas P. Revelle, United States District Attorney, Its Proctor, and to the Clerk of the Above-entitled Court:

You and each of you will please take notice that the Commercial Credit Company, a corporation, the above-named claimant hereby appeals from the final decree and judgment of the above-entitled court in the above-entitled cause and from the whole thereof, which decree and judgment was made, entered and filed in the above-entitled cause on the 5th day of May, 1926, to the United States Circuit Court of Appeals for the Ninth Circuit.

COMMERCIAL CREDIT COMPANY, a Corporation,
By JOHN J. KENNETT,
Atty. of Record.
JOHN J. KENNETT,
Proctor for Claimant.

Due service of the within notice of appeal after the filing of the same in the office of the clerk of the

above-entitled court admitted this 13th day of May, 1926.

PAUL D. COLES,
Proctor for Libellant.

[Endorsed]: Filed May 13, 1926. [43]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR ON BEHALF OF THE COMMERCIAL CREDIT COMPANY, A CORPORATION, CLAIMANT.

Comes now the Commercial Credit Company, a corporation, claimant, of the above-described automobile, by its proctor John J. Kennett, and says that in the record and proceedings in said cause and in the judgment and decree entered therein there is manifest error in the following particular:

(1) The Court erred in this: That it failed and refused to make and enter any findings of fact or conclusions of law.

(2) That the Court erred in this: That it failed and refused to make and cause to be entered the findings of fact and conclusions of law proposed by claimant.

(3) The Court erred in not granting claimant's motion to dismiss made at the conclusion of the case.

(4) The Court erred in causing the final judgment and decree to be made and entered herein for the reason that the same is contrary to the evidence and the law.

(5) The Court erred in not dismissing the case

on the grounds that the libellant had failed to prove that no tax had been paid on the liquor involved in this case. [44]

(6) The Court erred in holding that the absence of revenue stamps upon quart containers of liquor was evidence that a tax has not been paid, for the reason that under the law liquor found in containers of less than five gallons capacity are presumed tax paid.

(7) The Court erred in not dismissing libellant's case for the reason that the proceedings were brought under Section 3450 of the Revised Statutes which has been repealed by the National Prohibition Act in so far as it relates to the possession and transportation of intoxicating liquors.

(8) The Court erred in not dismissing libellant's case for the reason that the automobile involved herein was subject to forfeiture only under Section 26 of the National Prohibition Act inasmuch as the record shows that W. G. Campbell, the man driving the car at the time of its seizure had been charged and convicted under the terms of the National Prohibition Act and that by virtue thereof the automobile herein was convicted at one and the same time.

(9) The Court erred in not dismissing libellant's case upon the ground that there is not now a tax levied or collectible under the laws of the United States on beverage liquor.

(10) The Court erred in entering a decree of forfeiture herein for the reason that there is no evidence whatsoever in the record to show that the automobile was being used for the removal, conceal-

ment, or deposit of intoxicating liquor with an intent to defraud the United States of a tax due thereon.

JOHN J. KENNETT,
Proctor for Claimant.

Copy received this 18th day of June, 1926.

By ————————,
Attorney for Libellant. [45]

[Endorsed]: Received Office of U. S. Attorney, Jun. 18, 1926. Seattle, Wash. Ref. to ———.

[Endorsed]: Filed Jun. 18, 1926. [46]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Commercial Credit Company, a corporation, the above-named claimant, as principal, and the American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the United States of America, libellant, in the full sum of Two Hundred and Fifty ($250.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 13th day of May, 1926.

WHEREAS, Commercial Credit Company, a corporation, as claimant of the above-described automobile, has appealed to the United States Circuit

Court of Appeals for the Ninth Circuit from a judgment and decree of the United States District Court, Western District of Washington, Northern Division, filed in this cause on the 5th day of May, 1926, which decree ordered the above-described automobile forfeited to libellant.

Now, wherefore the condition of this obligation is such that if said appellant, Commercial Credit Company, a corporation, shall prosecute said appeal with effect and pay all costs which [47] may be awarded against it as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

COMMERCIAL CREDIT COMPANY, a Corporation,

By JOHN J. KENNETT,
Its Attorney of Record.

AMERICAN SURETY COMPANY, OF NEW YORK, a Corporation,

By A. E. KRULL,
Resident Vice-President.

[Seal] Attest: E. F. KIDD.

Notice of filing of this bond and justification of sureties waived and this bond approved this 13th day of May, 1926.

THOMAS P. REVELLE,
United States District Attorney and Attorney for Libellant.

By PAUL D. COLES,
Assistant United States Attorney.

The above bond is approved this 13 day of May, 1926.

NETERER,
United States District Judge.

[Endorsed]: Filed May 13, 1926. [48]

[Title of Court and Cause.]

STIPULATION AND ORDER RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between counsel for libellant and counsel for claimant that claimant may have up to and including the 1st day of May, 1926, to propose, serve and file its proposed bill of exceptions.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals this 10th day of April, 1926.

THOS. P. REVELLE and
PAUL D. COLES,
Attorneys for Libellant.
JOHN J. KENNETT,
Attorney for Claimant.

ORDER.

Upon reading the foregoing stipulation:

IT IS HEREBY ORDERED that claimant may have up to and including the 1st day of May, 1926, to propose, serve and file its proposed bill of exceptions.

Done in chambers this 10th day of April, 1926.

BOURQUIN,
Judge.

[Endorsed]: Filed Apr. 10, 1926. [49]

[Title of Court and Cause.]

STIPULATION RE TRANSCRIPT OF RECORD.

The parties hereto to the above cause, to wit, libellant and claimant, acting through their respective attorneys of record, hereby stipulate that the November Term of the above-entitled court in the above-entitled division and district for 1925 may be extended for the full period of sixty days from and after its expiration on May 4th, 1926, and that during said time judgment may be entered and claimant may prepare, file and settle its bill of exceptions, statement of facts or admiralty record, as the case may be, for purposes of writ of error or an appeal as the claimant may be advised, and that the above-entitled court shall have full power and jurisdiction to make or enter any order for said purposes during said period of time.

IT IS FURTHER STIPULATED that the Honorable Jeremiah Neterer, one of the Judges of the above court may sign and appropriate order to carry out the purposes of this stipulation.

Dated at Seattle, Washington, this 30th day of April, 1926.

PAUL D. COLES,
Attorney for Libellant.
JOHN J. KENNETT,
Attorney for Claimant.

[Endorsed]: Filed Apr. 30, 1926. [50]

[Title of Court and Cause.]

ORDER EXTENDING TIME AND TERM IN THE ABOVE CAUSE (APRIL 30, 1926).

Upon the application of the claimant in the above-entitled cause for an order extending the term and time in said cause for purposes of entering judgment and preparing, serving, filing and settling a bill of exceptions, statement of facts, or admiralty record, as the claimant may be advised; and the Court being duly advised as to the propriety of granting said application;

IT IS ORDERED that the November Term of the United States District Court for the above-entitled division and district for 1925 be and it hereby is extended for the full period of sixty days from and after its expiration on May 4th, 1926, for purposes of entering judgment or decree in the above cause and of allowing claimant to prepare, serve, file and settle its bill of exceptions, statement of facts, or admiralty record in said cause for purposes of an appeal or writ of error as the claimant may be advised, and during the extended time such

orders may be made as may be necessary to carry out the purposes of this extension.

Done at chambers this 30th day of April, 1926.

JEREMIAH NETERER,
Judge. [51]

[Title of Court and Cause.]

ORDER EXTENDING TIME AND TERM IN THE ABOVE CAUSE (JUNE 11, 1926).

Upon the application of the claimant in the above-entitled cause for an order extending the term and time in said cause for purposes of serving, filing and settling a bill of exceptions, statement of facts, or admiralty record, as the claimant may be advised; and the Court being duly adivsed as to the propriety of granting said application;

IT IS ORDERED that the November Term of the United States District Court for the above-entitled division and district for 1925 be and it hereby is extended for the full period of sixty days from and after its expiration on July 4th, 1926, under previous order made in this cause extending time and term to July 4, 1926, for purposes of allowing claimant to prepare, serve, file and settle its bill of exceptions, statement of facts, or admiralty record in said cause for purposes of an appeal or writ of error as the claimant may be advised, and during the extended time such orders may be made as may be necessary to carry out the purposes of this extension.

Done in chambers this 11 day of June, 1926.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jun. 11, 1926. [52]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME WITHIN WHICH APPELLATE RECORD MAY BE LODGED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

It is stipulated in the above cause between the parties hereto that claimant and appellant may have until the first day of August, 1926, within which to lodge appellate record in the above-entitled cause in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the above-entitled court may make an order upon this stipulation enlarging the time within which to lodge appellate record and to file and docket said cause in the said Court of Appeals to and including the first day of August, 1926.

WITNESS our hands and seals at Seattle, this 11th day of June, A. D. 1926.

THOMAS P. REVELLE,
By PAUL D. COLES,
Proctor for Libellant.

JOHN J. KENNETT,
Proctor for Claimant-Appellant.

[Endorsed]: Filed Jun. 11, 1926. [53]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO LODGE RECORD ON APPEAL TO AND INCLUDING AUGUST 1, 1926.

IT IS ORDERED that the time within which to lodge the appellate record in the above-entitled cause in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit may be, and it is hereby enlarged and extended from the date of its expiration under citation and rule of Court to and including the first day of August, 1926.

Done in open court this 11th day of June, A. D. 1926.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jun. 11, 1926. [54]

[Title of Court and Cause.]

STIPULATION AND ORDER AS TO TRANSMITTAL OF ORIGINAL EXHIBITS.

It is hereby stipulated by and between libelant through its proctors, Thos. P. Revelle and Paul D. Coles and claimant through its proctor John J. Kennett that the original exhibits herein, to wit: Claimants' Exhibit "A" (Conditional Sales Contract), instead of copies thereof shall be sent up by the Clerk of the District Court to the Cir-

cuit Court of Appeals as a part of the record on appeal herein.

Dated at Seattle this 18th day of June, 1926.

THOS. P. REVELLE,
PAUL D. COLES,
Proctors for Libelant.
JOHN J. KENNETT,
Proctor for Claimant.

ORDER.

It is so ordered.

Done in open court this 18th day of June, 1926.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jun. 18, 1926. [55]

[Title of Court and Cause.]

STIPULATION AS TO RECORD AND APOSTLES ON APPEAL.

It is hereby stipulated by and between United States of America, libelant, through its proctors Thos. P. Revelle and Paul D. Coles, and the Commercial Credit Company, a corporation, claimant, through its proctor, John J. Kennett, as follows, to wit:

Stipulation for costs were duly filed by claimant and that in making up the record on appeal of claimant the United States Circuit Court of Appeals for the 9th Circuit that the apostles on appeal shall include and that the Clerk of the above-

entitled court shall include therein the following and nothing more.

1. Caption exhibiting proper style of the court and title of the cause.
2. Statement showing time of the commencement of suit, etc. (In conformity with Subdivision 1, Section 1, Rule 4, of Admiralty Rules of the United States Circuit Court of Appeals for 9th Circuit).
3. Libel of information.
4. Claim of Commercial Credit Company, a corporation. [56]
5. Answer of Commercial Credit Company, claimant.
6. Order allowing filing of amended answer.
7. Amended answer of Commercial Credit Company.
8. Order re filing stipulation waiving jury trial.
9. Stipulation waiving jury trial.
10. Transcript of trial proceedings and evidence and the stipulation attached thereto.
11. Claimant's proposed findings of fact and conclusions of law and notations thereon.
12. Claimant's proposed judgment and notations thereon.
13. Memorandum decision of Judge Bourquin.
14. Final judgment and decree and exceptions thereto.
15. Order staying proceedings on judgment decree.
16. Notice of appeal and admission of service.
17. Citation on appeal.

18. Bond on appeal.
19. Stipulation re bill of exceptions.
20. Order extending time and term in above cause (Order of April 30, 1926).
21. Order extending time and term in above cause (Order of June 11, 1926).
22. Stipulation extending time within which appellate record may be lodged in office of the Clerk of Circuit Court of Appeals for Ninth Circuit.
23. Order extending time to lodge record on appeal.
24. Assignments of error with admission of service.
25. Stipulation as to record and apostles on file.
26. Praecipe for apostles on appeal.
27. Clerk's certificate.
28. Stipulation and order re transmittal of original exhibits. [57]

Dated at Seattle, Washington, this 17th day of June, A. D. 1926.

THOS. P. REVELLE,
PAUL D. COLES,
Proctors for Libelant.
JOHN J. KENNETT,
Proctor for Claimant.

[Endorsed]: Filed Jun. 18, 1926. [58]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

Please prepare apostles on appeal of the above-entitled action to contain the following:

1. All the papers and documents mentioned and described in the "Stipulation as to record and apostles on appeal" filed in this court on the 18th day of June, 1926.

2. All originals exhibits in the case.

JOHN J. KENNETT,
Proctor for Claimant.

Service of a copy of within admitted this 18th day of June, 1926.

THOS. P. REVELLE,
Proctor for Libelant.

[Endorsed]: Filed Jun. 18, 1926. [59]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 59, inclusive, to be a full, true, correct and complete

copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [60]

Clerk's fees (Act February 11, 1925) for making record, certificate or return, 144 folios, at 15¢	$21.60
Certificate of Clerk to transcript of record, with seal	.50
Certificate of Clerk to original exhibits, with seal	.50
Total	$22.60

I hereby certify that the above cost for preparing and certifying record, amounting to $22.60 has been paid to me by the proctor for the appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

Form 309—216 note—6-24

ARIZONA, IDAHO, MONTANA, NEVADA, OREGON, UTAH, WASHINGTON
(Agreement Must Be Filed in Arizona, Montana and Washington)

WITHOUT RECOURSE
CONDITIONAL SALE AGREEMENT

(ORIGINAL)

This Agreement, made this 14th day of November 192 4 between HOWARD MOTOR COMPANY (Dealer's Name) of SEATTLE WASH. (Dealer's Address) first party, his or its successors, or assigns (hereinafter called "Seller"), and W. G. Campbell (Buyer's Name) at Hamburg Apts. 2205 2nd Ave. Seattle, Wash. (Buyer's Street Address) (Buyer's Town and State) second party (hereinafter called "Buyer")

WITNESSETH:—THAT the Seller in consideration of the payments, agreements and conditions contained herein which on the part of the Buyer are to be made, done and performed, has this day delivered and agreed to sell and the Buyer has this day agreed to buy from the Seller, but upon the conditions hereinafter recited, to the Buyer the following Passenger or Commercial Car, or Tractor hereinafter called the "Car"):

MAKE	Type of Body	Model Letter or Number	Manufacturer's Serial No.	Motor No.	No. Cylinders	Advertised Horse Power	If Truck: Tons Capacity	Year Model	List Price F.O.B. Factory	Selling Price
Ford	Coupe	T	10587845	4	20			1924	525.	650.

with extra equipment, etc., for the sum of Seven Hundred Eighty-eight & 94/100 (Total Cost to Buyer) ($ 788.94).

The Buyer has this day paid to the Seller One Hundred Eighty-one & 75/100 (Total Payment Made) Dollars ($ 181.75).

and the Buyer agrees to pay to the Seller, or order Six Hundred Seven & 19/100 (Total Balance to Be Paid) Dollars ($ 607.19).

balance, payable in 12 installments of $ 50.59 each, on the 14th day of each succeeding month, which installments shall bear interest after maturity until paid at the highest legal contract rate and are to be evidenced by a promissory note (not as payment, but as evidence of the amounts to become due hereunder) made by the Buyer to the order of the Seller, bearing date hereof, and maturing on the due dates of said respective installments. Any extension or assignments of this Agreement or said note shall not waive any condition herein contained.

Title to the Car and extra equipment shall not pass by delivery to the Buyer but shall remain vested in and be the property of the Seller or Assigns until the purchase price has been fully paid. Buyer agrees to operate and control said Car in conformity with all Laws and Ordinances and to indemnify and save harmless the Seller from any and all loss, or damage to persons or property caused by said Car or by the use and operation thereof to which the Seller might possibly be subjected.

Buyer agrees and acknowledges that the within contract covers all conditions and agreements between the parties, that the loss, injury or destruction of said Car shall not release said Buyer from payment as provided herein. Buyer hereby acknowledges receipt of and accepts the Car, having first examined and tested the same and found same in sound and first class condition, and agrees to keep the Car insured against loss by fire, theft, conversion and confiscation with insurance companies acceptable to the Seller for not less than the amount owing, and until fully paid, payable to and to protect the interest of the Seller or Seller's Assigns, and the Seller or Seller's Assigns may place, continue and renew such insurance for the Buyer at the Buyer's expense if the Seller or Assigns so elects, and cost of such insurance shall become a part of the Buyer's obligation hereunder.

Buyer agrees to pay all taxes that may be assessed upon the property described herein or his license fees or charges against said Car and to keep same in good condition, and that any equipment, repairs or accessories placed upon said Car shall be at Buyer's expense and become a component part thereof and included in the terms of this Agreement. Buyer further agrees not to use or permit said Car to be used for passenger hire.

Buyer further agrees that he will not use or cause or permit to be used the car, truck or tractor herein mentioned for the transportation of liquor, wines or any other beverage, for personal or commercial use, prohibited by any Federal or State statute to be transported, and it is hereby agreed that should the car, truck or tractor hereinbefore described be used for such purpose or any other unlawful purpose, it shall be considered as a default under the agreement, whether or not there shall be a default under any other terms or conditions thereof, which shall entitle the holder hereof to immediate and continued possession of the car, truck or tractor herein described.

Buyer agrees that in the event of any law or ordinance requiring the recordation of this Agreement, that it shall be recorded at the expense of the Buyer and in his name, and at any time, by the Seller, or the holder of this Agreement.

Should the Buyer fail to keep and perform any or all his agreements herein contained, and to promptly pay at maturity any and all sums hereunder, or if said Car is removed or attempted to be removed from the State in which the Buyer now resides, or to be otherwise disposed of, or if Buyer shall lend, sell or encumber, or shall attempt to sell or encumber said Car or in case of misuse or abuse thereof, or whenever the Seller or his assign shall deem the debt insecure, said Seller may without any demand or notice take possession of said Car and equipments, wherever found and without process of law. Buyer does hereby expressly waive any right of action against the Seller growing out of the removal, repossession or retention of said Car or otherwise, and hereby consents that upon any default (or in the event that the Buyer, for any reason gives up or loses possession of the Car), all unpaid balance of said purchase price shall forthwith become due and payable at the option of the Seller or Seller's assigns. Buyer agrees that all payments made shall belong to and be retained by Seller as liquidated damages for the nonfulfillment of this Agreement, for loss in value of the Car, and for the rental value thereof.

Seller may, by suit or otherwise, enforce payment of said note, and no legal proceedings with respect thereto shall be deemed any waiver of said right of Seller to take possession on default or breach as aforesaid. Upon the Seller so taking possession of the Car, Seller may sell the Car at public or private sale at any time thereafter without any notice to the Buyer, and said Seller may become the purchaser thereof, and if the proceeds thereof are insufficient to pay all sums remaining unpaid hereunder and the expense caused by such repossession, removal, reparation, storage, liens and sale, including all collection expenses and a reasonable attorney's fee, incurred in taking possession of said Car, or in or about the sale thereof, or in collecting in any manner any sums which may be due and owing hereunder, Buyer agrees to pay any deficiency as damages for use of said property. The waiver or indulgence of any default shall not operate as a waiver of subsequent defaults.

Buyer agrees that said Seller, in case said Buyer fails to comply with any of the agreements aforesaid on Buyer's part to be performed, may, at Seller's option, cause judgment to be entered against said Buyer upon this agreement for the whole amount unpaid, or upon the said note, interest and costs, whether or not the same shall have become due and payable by reason of maturity or under the conditions of this agreement, and said Buyer hereby waives stay of execution, exemption laws, right of inquisition on real estate, errors and appeals, and further authorizes any attorney of any Court of Record as his lawful attorney to appear for and confess judgment against said Buyer, and in such event the Buyer hereby agrees to pay a reasonable attorney fee. Time is of the essence of this agreement.

This agreement shall apply to and bind the heirs, executors, administrators and assigns of the Buyer, and shall inure to the benefit of the Seller, Seller's heirs, executors, administrators, successors and assigns, and contains the entire agreement between the parties hereto, their agents or employees, either verbal or written.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this Agreement, in triplicate, the day and year first above written.

WITNESS: E. E. Pinkham

Address 4223-49th N.E.

WITNESS: _____

Address _____

W. G. Campbell (Seal)
(Buyer Sign Here)

By _____ (Seal)
(Owner, Officer or Firm Member)

HOWARD MOTOR COMPANY (Seal)
(Dealer Sign Here)

By C. Howard (Seal)
(Owner, Officer or Firm Member)

Dealer Must Sign Assignments on Reverse Side

BUYER'S STATEMENT

(Original)

Town Seattle, Wash. State

To HOWARD MOTOR COMPANY Date Nov. 14, 1924 192

(Manufacturer, Distributor or Dealer) and to COMMERCIAL CREDIT COMPANY, San Francisco, Calif.

For the purpose of securing credit from you on my (our) obligation hereto attached, given per statement herein, for a new Ford (Passenger or Commercial Car or Tractor), delivery and receipt of which is hereby acknowledged, I (we) hereby warrant that: I (we) can meet the payments provided for in said obligation as they become due, and I (we) covenant not to sell, trade, encumber or give up possession of the car, truck or tractor, and that same will not be used for passenger hire without your written consent until paid for in full.

MY PRESENT BUSINESS, PROFESSION OR POSITION IS Broker I have been so employed 3 Years

Name and Address of Present Employer myself I HAVE BEEN IN PRESENT POSITION 3 YEARS

Age 39 Married yes Number Dependents none Salary and net income last year was over $ 150.00 per mo.

Bank Account with Seattle National Bank of Seattle, Wash. Town State.

If you do not live in your own home give name and address of Landlord: Robt. Smart, 2nd & Blanchard

Have bought on credit from or other business references: Name G. English Address Norman Garage, 2025 3rd Ave. Name H. C. McLaughlin Address 4411 Meridian Ave. Name Address

Description and location of Real Estate or Personal Property owned in my (our) name:

Description	Location	Cash Value	Owing on Same
		$	$
		$	$

Is the Passenger or Commercial Car or Tractor NEW OR USED? new For Pleasure, Hire, or Business Use? pleasure

What make Passenger or Commercial Car or Tractor have you owned other than this car? Ford

through what Dealer? W. O. McKay Co., What Credit Company or Bank? P.S.Savings & Loan If purchased on time.

I carry Life Insurance for $ none with Company of

Statement of Items covering Buyer's obligation given for new Passenger or Commercial Car or Tractor

Delivered Cash Price of Passenger or Commercial Car or Tractor (If Truck, of Chassis)	$ 632.89
Speedometer & Dash light	19.50
Bumper	15.50
Extra Equipment—Itemize	
Bailey Brakes	25.00
Changing gas tank to rear	7.50
Insurance, filing fee & bond	26.55
Cash Selling Price	$ 726.94
Services, Expenses and Interest (See Rate Sheet)	62.00
Total Cost to Buyer on Time	$ 788.94
Less: Allowance, if any, on "Trade in"	
CASH PAYMENT 1/4th	181.75
Balance in 12 Monthly Payments	$ 607.19

WITNESS

Address

ADDRESS OF BUYER: Telephone No.

Residence Humphries Apts., Street or R. F. D. No. 2205 2nd Ave.,

Town Seattle State Wash.

How long have you lived here? five Years

Business Address Street or R.F.D. No.

Town State

Remarks

Signed H. G. Campbell (Buyer)

By (Owner, Firm Member or Officer)

AUTHORIZED DEALER'S ASSIGNMENT COVERING MONTHLY PAYMENT CONTRACTS EXCLUDING WITH RECOURSE CONTRACTS

(ORIGINAL)

FOR VALUE RECEIVED, the within agreement between and the undersigned, and all right, title and interest of the undersigned in and to the property therein described, together with all the moneys due, or to become due and payable thereunder, are hereby sold, assigned, transferred and set over by the undersigned to COMMERCIAL CREDIT COMPANY, San Francisco, California, its successors and assigns.

The undersigned warrants that said agreement was made in good faith and was actually signed by the person or persons named therein as the buyer; that the property is correctly described therein and has been actually delivered in good faith to the buyer therein named; that at the time of making said agreement the undersigned had a good and sufficent title to the said property without encumbrance of any kind whatsoever, that there are no liens of claims against said property except the rights of the buyer as stated in said agreement and that the undersigned is the sole and unconditional owner of said agreement.

Dated at (Dealer's Town and State)

this day of 192

(Name of Dealer)

By (Officer, Firm Member or Owner)

AUTHORIZED DEALER'S ASSIGNMENT AND GUARANTY OF WITH RECOURSE CONTRACTS

FOR VALUE RECEIVED, the Agreement (on the reverse side) and the note therein mentioned

Between W. G. Campbell (Buyer's Name Here) and the undersigned, and the property therein described, and all the right, title and interest therein of the undersigned are hereby sold, assigned and transferred to Commercial Credit Company, San Francisco, Calif., its successors or assigns. The undersigned jointly and severally hereby guarantees full performance of said Agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs and attorney's fees, and agrees to pay the attorney's fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this Agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby agree that in the event or repossession, the entire balance outstanding under such agreement shall become immediately due and payable. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, presentment or protest, which may be required under said Agreement, or note mentioned in same, or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said Agreement shall not in any manner release the undersigned.

(ORIGINAL)

Dated this 14th day of November 192 4

At SEATTLE (Dealer's Town) State of WASH.

Signed: HOWARD MOTOR COMPANY (Dealer) (Seal)

By (Officer, Firm Member or Owner)

No. 4916

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the September term A. D. 1926 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City of Seattle, in the State of Washington, on Thursday, the twenty-third day of September, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, District Judge; Honorable FRANK H. KERRIGAN, District Judge.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER OF SUBMISSION.

ORDERED appeal in the above-entitled cause argued by Mr. John J. Kennett, counsel for the appellant, and by Mr. Paul D. Coles, Assistant United States Attorney, counsel for the appellee, and submitted to abide the decision of the Supreme Court of the United States in the case of Port Gardner Investment Company vs. United States of America, No. 4531, and with leave to counsel for the appellant to file typewritten brief in reply.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable FRANK S. DIETRICH, Circuit Judge.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Circuit Judge, and Frank S. Dietrich and Frank H. Kerrigan, District Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk,

and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Before RUDKIN, Circuit Judge, and DIETRICH and KERRIGAN, District Judges.

KERRIGAN, District Judge.—This case differs in only one respect from that bearing the same title and numbered 4915, decided February 14, 1927, —— Fed. (2d) ——, in that the driver of the seized automobile, although charged with both illegal possession of intoxicating liquor and transportation thereof, was prosecuted only for the offense first named, upon plea of guilty and con-

viction of which the Government dismissed the other charge.

Several points urged as grounds for reversal of the decree of forfeiture of the automobile here entered have, since the submission of the appeal, been decided by the Supreme Court adversely to the contentions of appellant (U. S. vs. One Ford Coupe Automobile, decided Nov. 22, 1926, —— U. S., ——, 47 S. Ct. 154), those contentions being:

(1) that at the time of the seizure of the vehicle there was no tax imposed upon intoxicating liquor for beverage purposes;

(2) that section 3450 of the Revised Statutes was repealed by the enactment of the National Prohibition Act in so far as it related to the transportation and possession of intoxicating liquors;

(3) that if a tax exists on intoxicating liquors there is no duty on anyone other than the person removing the liquor from a bonded warehouse or distillery to pay the tax; and

(4) that section 3450 of the Revised Statutes has no application to a removal, deposit or concealment of distilled spirits from a place other than a distillery warehouse, bonded warehouse or place where liquor may be legally kept, without a tax being paid thereon.

The further point is made by appellant that a prosecution and conviction, under the provisions of the National Prohibition Act, of the vendee in possession of an automobile at the time it was

seized constitutes a bar to forfeit the automobile under section 3450.

This question was recently decided by the Supreme Court in Port Gardner Investment Company vs. U. S. A., ——, U. S. ——, 47 S. Ct. 165. There the driver of an automobile seized by prohibition agents was charged with possession and transportation of intoxicating liquor in violation of the National Prohibition Act. He pleaded guilty to both charges and was sentenced to pay a fine. Thereupon a proceeding similar to this was commenced to forfeit the automobile. This court, upon the case reaching it, by writ of error, certified to the Supreme Court, among others, the following question:

> "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under section 26 of that Act and thereby prevent the forfeiture of the car under section 3450 of the Revised Statutes of the United States?"

The Supreme Court returned the following answer:

> "Construing the question as referring to the prosecution with effect we answer the question in the affirmative";

and the court gave as its reason for the conclusion reached that the disposition of the automibile prescribed in section 26 of the Prohibition Act became mandatory after its driver's conviction; and, being

inconsistent with the disposition under section 3450, necessarily precluded resort to the proceedings under the latter section.

We have carefully considered the question of the applicability of this decision of the Supreme Court to the case before us, and are constrained to hold that it is not to be given application. The inconsistency there referred to between the provisions of the two enactments considered does not here exist, since there was no prosecution with effect of the charge of transportation, that count of the indictment having been dismissed. Said section 26 provides that "When the Commissioner . . . or any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquors in any . . . vehicle it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed shall be seized by an officer he shall take possession of the vehicle . . . and arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title." Then follow directions as to proceedings to be taken for the disposition of the automobile. While the section, in directing that the officer shall take possession of the vehicle, makes use of the words "transported or possessed" when referring to the liquor discovered in process of transportation, it is quite clear that the gravamen of the offense is the unlawful transportation, and that the disposition of the vehicle therein provided

refers to this element of the transaction. The statute elsewhere (sec. 3 thereof) makes possession of intoxicating liquor an offense, for which a punishment is provided by section 29. We do not think that Congress, having provided for the forfeiture of the offender's interest in the vehicle as a penalty for transportation, and a different punishment for unlawful possession of intoxicating liquor, intended to create a third offense, namely, possession in transportation, the penalty for which would include a forfeiture already incurred by reason of the act of transporting.

It follows, we think, that a prosecution for possession merely must be referred to section 3 of the Act, and in the case before us that is the only offense of which the driver of the automobile was convicted. Such conviction, as we have seen, did not entail the disposition of the automobile provided by section 26.

The Government is here seeking to forfeit the automobile by virtue of section 3450 of the Revised Statutes upon a charge of concealing therein tax unpaid intoxicating liquor with intent to evade payment of the tax. The conviction of unlawful possession under the National Prohibition Act is no bar to proceedings under said section of the Revised Statutes. Two acts made penal may be separately punished though both are involved in but one transaction (Gracie vs. U. S., 15 Fed. (2d) 644; Bell vs. U. S., 285 Fed. 145; certiorari denied, 262 U. S. 744; Earl et al., vs. U. S., 4 Fed. (2d)

532; Albrecht et al., vs. U. S., decided by U. S. Supreme Court, Jan. 3, 1927, —— U. S. ——, 47 S. Ct. 250. The disposition of the automobile not being involved in a conviction for possession merely, if the Government could make out a case of concealment with intent to evade payment of tax under section 3450, although based upon the same transaction in which the conviction of illegal possession was had, it was at liberty to do so, and to follow the proceeding thereby provided for the forfeiture of the offending vehicle.

Appellant's remaining contention is that there was no evidence that the tax on the liquor seized had not been paid. We think there was sufficient evidence before the trial court to sustain its conclusion to the contrary. In its decision that court summarized the evidence upon the point in the following terms:

> "A sea-port near Canadian line, smuggling of liquors, foreign brands and labels, hearsay to plaintiff's agents that the auto driver was handling smuggled liquors, watched several *delivers* prior to the instant seizure, illicit in so far that the driver was subsequently convicted for illegal possession, no taxes paid on imported liquors in this collection district in four years, and had any been elsewhere paid the bottles would have borne stamps accordingly, * * * "—which the evidence shows they did not.

And, as said by Judge Cushman in the case of U. S. vs. One White One-ton Truck, 4 Fed. (2d) 413, 414:

> "The court takes judicial notice of the fact that the Commissioner of Internal Revenue will not issue such a permit (that referred to in sec. 1, par. 813, Tariff Act of 1923, 42 Stats. at Large, p. 898) for the importation of such spirits into a state having what is popularly known as a 'bone dry' law, as has the state of Washington. Under such conditions there is no presumption warranted in law that spirits so seized have paid the tax; rather, the only presumption reasonably warranted is that the tax has not been paid."

This disposes of the questions raised. The decree is affirmed.

[Endorsed]: Opinion. Filed Feb. 21, 1927. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Decree. Filed and entered February 21, 1927. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR STAY OF MANDATE.

To the Honorable Judges of the Above-entitled Court:

Comes now the appellant above named and respectfully petitions the Court for an order staying the issuance of the mandate herein until the 20th day of May, 1927, and in the event that appellant files a petition for certiorari in the United States Supreme Court on or before that date that the mandate be stayed until a complete disposition of said cause has been made by the United States Supreme Court. The attached stipulation is offered in support of this request.

JOHN J. KENNETT,
Attorney for Appellant.

Received a copy of the within this 11 day of March, 1927.

THOS. P. REVELLE,
Attorney for ———.

[Endorsed]: Motion for Stay of Mandate. Filed Mar. 15, 1927. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STIPULATION STAYING ISSUANCE OF MANDATE UNDER RULE 32.

Whereas, Commercial Credit Company, a corporation, appellant, is preparing its petition for certiorari, which it intends to file in the Supreme Court of the United States to have reviewed the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, filed in the above-entitled cause on February 21st, 1927; and,

Whereas, the Appellant herein is desirous that the Supreme Court of the United States shall review the judgment herein and definitely establish the law in cases of this character, and,

Whereas, a good and sufficient surety bond has been substituted in place and instead of the automobile proceeded against herein and the appellee is amply protected thereby,—

Now, therefore, it is stipulated by and between the respective parties hereto, appellant by John J. Kennett, its attorney and the appellee by Thomas P. Revelle and Paul D. Coles, United States District Attorneys, its attorneys, as follows:

That the mandate of the Circuit Court of Appeals in this cause shall be stayed until and including the 20th day of May, 1927, and that an order may be entered herein to that effect;

Provided, however, that if appellant shall not have filed its proposed petition for certiorari in the Supreme Court of the United States on or before the 20th day of May, 1927, then and in that case the mandate of the court entitled herein may issue at any time after said date.

Dated at Seattle, Washington, this 11th day of March, 1927.

COMMERCIAL CREDIT COMPANY, a Corporation, Appellant.

By JOHN J. KENNETT,
Its Attorney.

THE UNITED STATES OF AMERICA,
Appellee,

By THOMAS P. REVELLE,
United States District Attorney.

PAUL D. COLES,
Deputy United States District Attorney,
Its Attorneys.

[Endorsed]: Stipulation Staying Issuance of Mandate Under Rule 32. Filed Mar. 16, 1927. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER STAYING ISSUANCE OF MANDATE.

On consideration of the motion of Mr. John J. Kennett, attorney for appellant, and pursuant to the stipulation of counsel for the respective parties, this day filed therefor, and it appearing to the Court that the appellee consents thereto, and good cause therefor appearing,—

IT IS ORDERED that the issuance of the mandate under Rule 32 of this Court in the above-entitled cause be, and it is hereby stayed to and including May 20th, 1927, provided, however, that if appellant does not file and docket its petition for certiorari with the Clerk of the United States Supreme Court on or before said date said mandate shall immediately issue.

IT IS FURTHER ORDERED that if said petition for certiorari be filed with the Clerk of the United States Supreme Court on or before May 20, 1927, then, and in that event the mandate herein

shall be stayed until such a time as the United States Supreme Court shall have disposed of said petition.

Done this 15th day of March, 1927.

F. H. RUDKIN,
Judge.

O. K.—PAUL D. COLES,
Asst. U. S. Atty.

[Endorsed]: Order Staying Issuance of Mandate. Filed Mar. 16, 1927. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4916.

COMMERCIAL CREDIT COMPANY, a Corporation, Claimant of One Ford Coupe, etc.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-three (83) pages, numbered from and including 1 to and including 83, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of May, A. D. 1927.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8210)

(12)

FILED
MAY 19 1927
W. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

No. [redacted] 258

COMMERCIAL CREDIT COMPANY,
(a corporation)
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN SUPPORT OF SAID PETITION.

DUANE R. DILLS,
100 East 42nd Street,
New York, N. Y.,
Counsel for Petitioner.

JOHN J. KENNETT,
L. C. Smith Building,
Seattle, Washington,

CHARLES W. HASWELL,
433 California Street,
San Francisco, California,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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APPENDIX (Conflicting opinion of Second Circuit—not yet reported)	19–26

IN THE

Supreme Court of the United States

COMMERCIAL CREDIT COMPANY,
(a corporation)
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Commercial Credit Company, a corporation, respectfully shows as follows:

1. The decision of the United States Circuit Court of Appeals in this case is reported—*Commercial Credit Company* v. *United States,* 17 Federal Reporter (2d) 902—Advance Sheets April 28, 1927.

This case brings up for decision by the United States Supreme Court the question which was expressly left open in *United States* v. *One Ford Coupe,* 272 U. S. 321, 47 Supreme Ct. 154, 71 Law Ed. 180, and *Port Gardner Invest-*

ment Company v. *United States,* 272 U. S. 564, 47 Supreme Ct. 165, 71 Law Ed. 193. To quote from Mr. Justice Butler in his concurring opinion in the Port Gardner Investment case:

> "The substance of that question is whether the prohibition officer, discovering one in the act of transportation, may disregard the plain and direct commands of Section 26 to proceed against the vehicle as there directed."

Facts.

2. On or about November 23, 1925, an information was filed and libel issued out of the District Court of the United States for the Western District of Washington, Northern Division, for and on behalf of respondent against one Ford Coupe, Motor No. 10587243, tools and accessories, and against all persons lawfully intervening for their interest therein, praying for the forfeiture of the said Ford Coupe, tools and accessories, because it was used in the removal, deposit and concealment of intoxicating liquor with intent to defraud the United States of the tax thereon (R. 3). At the trial of the case on March 29, 1926, before Honorable George M. Bourquin, United States District Judge, respondent introduced evidence as to the seizure of said Ford Coupe by the testimony of Matthew Ryan, a United States Customs Inspector, as follows:

> "And I decided to stop and catch him, so Inspector McTague was with me and we stopped there and he came out of the house and looked around and got into the coupe and started the motor and started to back out of the alley and I stopped him and told

him I would like to search his car, told him who I was and he says 'All right', so we opened up the back end of it and there was no liquor in there, we opened up the front door and the seat, there was only one seat in the car, the right-hand side was on a hinge and it was cut in the middle and just lifted up on a hinge and there was 13 quarts of liquor under the seat, so I arrested him and took him down to the immigration station and put the car in the appraisals warehouse" (R. 25-26).

It was stipulated by and between counsel for the petitioner and the respondent as follows:

> "Mr. Kennett (counsel for petitioner): It is further stipulated as a part of the claimant's case between the counsel for the Government and myself that the man driving this car, W. G. Campbell, was charged under the National Prohibition Law in cause No. 10223 of the records of this court with unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved.
>
> "Mr. Simon (counsel for the United States): It is so stipulated" (R. 31).

On December 16, 1925, petitioner filed in the said District Court for the Western District of Washington, Northern Division, claim for said Ford Coupe (R. 6), and made answer to the libel filed herein (R. 13), which answer was amended by the filing of an amended answer to said libel on March 24, 1926 (R. 16-19); and on January 4, 1926, the said Ford Coupe was released into the custody of your petitioner, upon your petitioner posting a bond in the sum of $500 therefor (R. 2); trial by jury was waived and the

case came on for trial on its merits on March 29, 1926, before the Honorable George M. Bourquin, United States District Judge for the Western District of Washington, Northern Division, and final decree was entered in the said District Court on May 5, 1926, in which it was ordered, adjudged and decreed that the motion of your petitioner to dismiss the libel be denied, and that said Ford Coupe and its tools and accessories be condemned and forfeited to the United States and forthwith sold (R. 46). Notice of appeal was filed by your petitioner on May 13, 1926, to the Circuit Court of Appeals for the Ninth Circuit; and in its assignment of errors in said appeal among other things your petitioner set forth that the District Court had erred in not dismissing the libel for the reason that the said Ford Coupe was subject to forfeiture only under Section 26 of the National Prohibition Act, and not subject to forfeiture under Section 3450 of the Revised Statutes, inasmuch as the record showed that the man driving the car at the time of its seizure had been charged and convicted under the terms of the National Prohibition Act, and by virtue thereof the automobile was convicted at one and the same time under that Act (R. 49); and the said appeal having been heard by the Circuit Court of Appeals for the Ninth Circuit as Case No. 4916, the said court did affirm the judgment of the District Court for the Western District of Washington, Northern Division, and the judgment of the Circuit Court was docketed February 21, 1927, and a stay of mandate thereupon issued to expire May 20, 1927.

3. Your petitioner is a Delaware corporation with its principal office at Baltimore, Maryland, and a branch office

at Seattle, Washington, in which State it has duly qualified to do business as a foreign corporation. Your petitioner is engaged among other things in the business of financing the sale of automobiles on the deferred payment plan by purchasing or otherwise acquiring from automobile dealers the conditional sale contracts and other instalment obligations given to automobile dealers by the retail purchasers of automobiles.

4. The Howard Motor Company, an automobile dealer at Seattle, Washington, on or about November 14, 1924, sold the said Ford Coupe with its tools and accessories under conditional sale contract to W. G. Campbell, sometimes known as and informed against in this case as Leo Oppie, under which contract title was expressly reserved until all payments owing thereon were fully paid. The Howard Motor Company on the same day, November 14, 1924, for valuable consideration assigned the conditional sale contract to your petitioner. At the time of the assignment of the said conditional sale contract to your petitioner by the said Howard Motor Company, there was due and owing upon it by the said Campbell the sum of $607.19, and at the time of the seizure of said automobile by the respondent there was due and owing to your petitioner by the said Campbell, the conditional vendee, $101.18. Your petitioner intervened in the proceeding to forfeit said automobile as an innocent owner or lienor and for the protection of its interests in accordance with Section 26 of the National Prohibition Act, and established evidence thereof (R. 31-35).

5. The decision of the United States District Court by Judge Bourquin was rendered on March 31, 1926, at

which time a decision was also made by Judge Bourquin in respect to a Gardiner car, in connection with which your petitioner had simultaneously intervened (R. 37-39) and decree of forfeiture was entered on April 20, 1926, in the Ford Coupe case (R. 46-47). Both of the decisions of Judge Bourquin, in the Ford Coupe case, the car involved in this action, and the Gardiner car, were therefore rendered before the decision of the United States Supreme Court in the case of *Port Gardner Investment Company* v. *United States*, and *United States* v. *One Ford Coupe Automobile*, which were rendered on November 22, 1926, and November 23, 1926, respectively.

5. An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit by your petitioner in respect to the Ford Coupe car involved in this action, which was case No. 4916, and also an appeal with reference to the Gardiner car, which was known as case No. 4915. The Circuit Court of Appeals reversed the District Court in respect to the Gardiner car on the strength of the holding of the United States Supreme Court in the Port Gardner Investment Company case. (See decision, *Commercial Credit Company* v. *United States*—C. C. A. 9th Circuit—17 Fed. (2d) 483; but affirmed the decision of the District Court with respect to the Ford Coupe involved in this action, case No. 4916, 17 Fed. R. (2d) 902, and in its opinion the Circuit Court distinguished this case from the one involving the Gardiner car, as follows:

> "This case differs in only one respect from that bearing the same title and number 4915, decided February 14, 1927, 17 Fed. (2d) 483, in that the driver of the seized automobile, although charged

with both illegal possession of intoxicating liquor and transportation thereof, was prosecuted only for the offense first named, upon plea of guilty and conviction of which the Government dismissed the other charge."

Decisions Below.

6. The decision of Judge Bourquin of the District Court is set forth in the record (R. 37-39) and is not yet reported. It was made on March 31, 1926, before the decision of the United States Supreme Court in the *Ford Coupe* and *Port Gardner Investment Company cases*, and covered both the Gardiner car in respect to which the decision of the District Court was reversed by the Circuit Court of Appeals (*Commercial Credit Company* v. *United States*, C. C. A. 9, 17 Fed. R. (2d) 483, and the Ford Coupe car in this case, which was affirmed by the Circuit Court of Appeals. *Commercial Credit Co.* v. *United States*, C. C. A. 9, 17 Fed. R. (2d) 902.

The District Court considered that the Ford Coupe was probably subject to forfeiture under Sections 5763, 5764 and 5765 Compiled Statutes for smuggling intoxicating liquors into the country, but in any event was subject to forfeiture, as was the Gardiner car, under Section 3450.

The opinion of the Circuit Court in the Ford Coupe case considered only the applicability of Section 3450 in the light of the decisions of the United States Supreme Court in *United States* v. *One Ford Coupe*, and *Port Gardner Investment Company* v. *United States*, and apparently did not consider the car subject to forfeiture under either the tariff or the customs laws. As to the application of Section 3450 and the decisions of the United States Supreme

Court in respect thereto, the Circuit Court of Appeals said (17 Fed. R (2d) 902, at 903):

> "We have carefully considered the question of the applicability of this decision (Port Gardner Investment Company *v.* United States) of the Supreme Court to the case before us, and are constrained to hold it is not to be given application. The inconsistency there referred to between the provisions of the two enactments considered does not here exist, since there was no prosecution with effect of the charge of transportation, that count of the indictment having been dismissed. • • •
>
> "While the section (Section 26 of the National Prohibition Act) in directing that the officer shall take possession of the vehicle, makes use of the words 'transported or possessed' when referring to the liquor discovered in process of transportation, it is quite clear that the gravamen of the offense is the unlawful transportation, and that the disposition of the vehicle therein provided refers to this element of the transaction. The statute elsewhere (sec. 3 thereof) makes possession of intoxicating liquor an offense, for which a punishment is provided by section 29. We do not think that Congress, having provided for the forfeiture of the offender's interest in the vehicle as a penalty for transportation, and a different punishment for unlawful possession of intoxicating liquor, intended to create a third offense, namely, possession in transportation, the penalty for which would include a forfeiture already incurred by reason of the act of transporting.
>
> "It follows, we think, that a prosecution for possession merely must be referred to section 3 of the Act, and in the case before us that is the only offense of which the driver of the automobile was convicted. Such conviction, as we have seen, did not entail the

disposition of the automobile provided by section 26.

"The government is here seeking to forfeit the automobile by virtue of section 3450 of the Revised Statutes upon a charge of concealing therein tax-unpaid intoxicating liquor with intent to evade payment of the tax. The conviction of unlawful possession under the National Prohibition Act is no bar to proceedings under said section of the Revised Statutes."

Decisions of the United States Supreme Court.

7. The point involved in this case remains open in the United States Supreme Court. See concurring opinion of Mr. Justice Stone and dissenting opinion of Mr. Justice Butler in *United States* v. *One Ford Coupe;* see concurring opinion of Mr. Justice Butler in *Port Gardner Investment Company* v. *United States.*

The Ford coupe, the subject matter of this case, was actually in motion and was transporting intoxicating liquor at the time of its seizure, as is evidenced by the testimony of Ryan above quoted, introduced by the respondent at the trial. Ryan testified that the coupe was backing out of the alley when he stopped it, and further testified that the coupe was reported to him as distributing liquor around town, and that he had watched it a couple of days before he seized it making deliveries (R. 25). The driver of the car, who was the conditional vendee, was arrested for violation of the National Prohibition Act, charged with both unlawful possession and transportation, and pled guilty of unlawful possession, whereupon the government dismissed the charge as to transportation (R. 31). The question then remains whether the government, finding the car

in the actual transportation of intoxicating liquor, can disregard the direct mandatory provisions of Section 26 of the National Prohibition Act, and prosecute the driver of the car under another section of that act for possession, dismissing the charge of transportation which is made against him, thereby giving the government the election of forfeiting the car under section 3450 of the Revised Statutes.

Conflict with Decisions of Other Circuit Courts.

8. The decision of the Ninth Circuit in this case, which was rendered on February 21, 1927, 17 Fed. R. (2d) 902, is in conflict with the decision of the United States Circuit Court of Appeals for the Second Court, in the case of *Commercial Credit Corporation* v. *United States,* decided on April 4, 1927 (not yet reported but printed as an appendix to this petition for convenience of the court). The question involved in the Second Circuit Court case was whether the arrest of the persons in control of the automobile, and the pendency of proceedings charging them with violation of the National Prohibition Act, precluded forfeiture of the vehicle under Section 3450. The persons driving were charged with both unlawful possession and transportation in violation of the National Prohibition Act, and they were being held on these charges. The Government then proceeded to forfeit the automobile under Section 3450 before the trial for violation of the National Prohibition Act. Circuit Judge Swan in his opinion, speaking for the unanimous court, said:

> "The sole question presented and argued was whether the pendency of a prosecution of the per-

sons in charge of the vehicle for violation of the National Prohibition Act precluded the United States from seeking a forfeiture of the vehicle under Sec. 3450. This question was expressly left open by the Supreme Court. • • •

"In the case at bar are present all the facts alluded to by Justice Brandeis as missing in the case under consideration by him. Lamonica and Calabresse were discovered in the act of transporting liquor in violation of law. Forthwith, under Sec. 26, it became the duty of the officer to seize the liquor, to take possession of the vehicle, to arrest the persons in charge thereof, to proceed at once against them 'under the provisions of this title', and to hold the vehicle (unless the owner should give bond) to abide the result of the trial of the persons arrested. • • •

"In these circumstances, we believe there is a direct conflict between the two sections in question, and that Sec. 26 must control the disposition of the vehicle. • • •

"It is settled that after the conviction of such persons, forfeiture under Sec. 3450 is forbidden. To say it is permitted during the pendency of the prosecution and up to the moment of conviction, would be most inequitable to innocent owners and lienors, and would put a premium upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons. We do not find in the Supreme Court decisions anything which compels us to take this view."

The Ninth Circuit Court of Appeals, in the case at issue, does not discuss the question of forfeiture under the tariff or custom laws, which was discussed in the opinion of the District Court; nevertheless, if the forfeiture

were upheld on that ground, the decision would be in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit, in the case of *National Bond and Investment Company* v. *U. S.*, 8 Fed. (2d) 942.

The libel did not allege that the Ford coupe brought liquor into the United States, nor was there any evidence it ever did bring liquor into the United States, and therefore under the decision of the Seventh Circuit it is not subject to forfeiture for any such offense.

Conflict with Statute.

9. The Ninth Circuit in its opinion says (17 Fed. (2d) 902, at 903):

> "While the section, in directing that the officer shall take possession of the vehicle, makes use of the words 'transported or possessed' when referring to the liquor discovered in process of transportation, it is quite clear that the gravamen of the offense is the unlawful transportation, and that the disposition of the vehicle therein provided refers to this element of the transaction. The statute elsewhere (sec. 3 thereof) makes possession of intoxicating liquor an offense, for which a punishment is provided by section 29. We do not think that Congress, having provided for the forfeiture of the offender's interest in the vehicle as a penalty for transportation, and a different punishment for unlawful possession of intoxicating liquor, intended to create a third offense, namely, possession in transportation, the penalty for which would include a forfeiture already incurred by reason of the act of transporting.
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> "It follows, we think, that a prosecution for possession merely must be referred to section 3 of the Act, and in the case before us that is the only offense

of which the driver of the automobile was convicted. Such conviction, as we have seen, did not entail the disposition of the automobile provided by section 26.

"The government is here seeking to forfeit the automobile by virtue of section 3450 of the Revised Statutes upon a charge of concealing therein tax-unpaid intoxicating liquor with intent to evade payment of the tax. The conviction of the unlawful possession under the National Prohibition Act is no bar to proceedings under said section of the Revised Statutes. * * * The disposition of the automobile not being involved in a conviction for possession merely, if the government could make out a case of concealment with intent to evade payment of tax under section 3450, although based upon the same transaction in which the conviction of illegal possession was had, it was at liberty to do so, and to follow the proceeding thereby provided for the forfeiture of the offending vehicle."

In its opinion the Circuit Court fails to point out that Section 3 of the National Prohibition Act contains in addition to the word "possess" the word "transport" also and several other words. Furthermore, it is also made unlawful under Section 25 to possess intoxicating liquor, and the punishment against the individual provided in Section 29 is not limited to merely possession but includes the other offenses denounced by the statute which covers also transportation. There is no justification for restricting Section 26 to a case where conviction for transportation alone might be charged. It seems that the Ninth Circuit has possibly misconstrued the concluding paragraph in the opinion of Mr. Justice Brandeis in *United States* v. *One Ford Coupe,* where he says:

> "The case at bar does not present any conceivable question of cumulative remedies or of election. While the second sentence in section 26 uses the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used."

In the case at bar, according to the evidence produced by the Government, the automobile was in motion and was transporting the liquor when stopped by an officer. The possession, therefore, was possession in transportation, as defined by Mr. Justice Brandeis, and in such a case the provisions of Section 26 are mandatory.

Importance of the Case.

10. Your petitioner, in addition to having the question at issue decided in the Ninth and Second Circuit Courts of Appeal, also has many cases pending in practically every Circuit of the United States. Other automobile companies and finance companies are similarly situated. The importance of the case to the automobile industry, which is now the largest industry in the United States, was pointed out in the briefs and arguments before the United States Supreme Court in *United States* v. *One Ford Coupe* and *Port Gardner Investment Company* v. *United States.* Since that time the National Association of Finance Companies, the National Automobile Chamber of Commerce, the National Automobile Dealers Association,

as well as local associations and the national clubs and associations of automobile owners have all met and considered possible means of getting an early determination of the point at issue. Your petitioner believes that the case now presented gives an opportunity for a decision on that point by the United States Supreme Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of this court directed to the Circuit Court of Appeals for the Ninth Circuit, to the end that this case may be reviewed and determined by this court, and that the judgment of the Circuit Court of Appeals in this case may be reviewed and reversed; and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and just, and thus your petitioner will ever pray.

COMMERCIAL CREDIT COMPANY,
By WILLIAM H. GRIMES,
President,

DUANE R. DILLS,
JOHN J. KENNETT,
CHARLES W. HASWELL,
Counsel for the Petitioner.

We certify that in our opinion the foregoing petition is well founded in point of law. It is not filed for delay.

DUANE R. DILLS,
JOHN J. KENNETT,
CHARLES W. HASWELL,
Counsel for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

COMMERCIAL CREDIT COMPANY,
(a corporation)
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF THE PETITION.

It will serve no useful purpose to cite all the cases on the subject, as most of them are referred to and considered in the decisions of this court in *United States* v. *One Ford Coupe* and *Port Gardner Investment Company* v. *United States*. The points that can be urged in support of this petition are referred to in the petition itself and are concisely covered in the concurring opinion and dissenting opinion by Mr. Justice Stone and Mr. Justice Butler in *United States* v. *One Ford Coupe*, and in the concurring opinion of Mr. Justice Butler in *Port Gardner Investment Company* v. *United States*. Mr. Justice Brandeis has pointed out in his opinion in *United States* v. *One Ford* Coupe, as has recently been mentioned by the United States Circuit Court for the Second Circuit in *Commercial Credit Corporation* v. *United States* (not yet reported but printed in the appendix to this petition) that the case of *United States* v. *One Ford Coupe* did not involve the question of transportation, as removal was not charged in that case and there was nothing in the record before the court to show that the car was ever in motion or used for the purpose of transportation. It would be inequitable to parties

situated as your petitioner for the Government to be allowed to arrest drivers of automobiles for transportation and possession of intoxicating liquor, and then to deny to innocent parties the relief provided by Congress by withdrawing the charge of transportation and allowing the charge of possession alone to remain. Certain it is there is nothing in the statute which warrants the conclusion that in such a case recourse might be had to Section 3450 of the Revised Statutes, when such recourse cannot be had in the event transportation alone is charged. It is evident that the Ninth Circuit has misunderstood the discussion by Mr. Justice Brandeis of the word "possessed" as it appears in Section 26 of the National Prohibition Act.

It is as important to the Government as it is to your petitioner that this question should be determined by the Supreme Court, as great expense is being incurred both by the Government and by parties situated as is your petitioner in the litigation of the hundreds of cases now blocking the court calendars. The automobiles in such cases must be held in the garages, and in many of the Circuits where violation of Section 3450 is charged, parties situated as is your petitioner are unable to secure cars under bond pending determination of the cases. Even in those cases where they can secure the cars under bond, some courts are now insisting that your petitioner must hold the cars in storage until the determination of the case.

It is respectfully submitted that the relief prayed for by petitioner in this case should be granted and a writ of certiorari issued, directed to the Ninth Circuit, so that the matter might finally be determined by this court.

DUANE R. DILLS,
JOHN J. KENNETT,
CHARLES W. HASWELL,
Counsel for the Petitioner.

Appendix.

(Conflicting Opinion of Second Circuit Court of Appeals.)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

COMMERCIAL CREDIT CORPORATION,
Claimant-Appellant,

v.

UNITED STATES OF AMERICA,
Libellant-Appellee.

Before:

HOUGH, MANTON and SWAN, Circuit Judges.

Appeal from a final decree of forfeiture entered in the District Court for the Southern District of New York.

The United States filed a libel against one Reo commercial automobile, alleging that there were removed, disposed and concealed therein one hundred gallons of distilled spirits, whereon a tax is imposed, with intent to defraud the United States of said tax, contrary to Section 3450 of the Revised Statutes. The Commercial Credit Corporation intervened as claimant, and filed an answer setting up three separate defenses. The first presented the issue whether the arrest of the persons in control of the automobile and the pendency of proceedings charging them with a violation of the Prohibition Act precluded forfeiture of the vehicle

under Section 3450. The second asserted such forfeiture would deprive the claimant of its property without due process of law. The third set up claimant's title and its innocence with respect to the use of the automobile for the illegal transportation. These separate defenses were ordered to be stricken from the answer.

The case then came on for trial by the court, the jury being waived, upon an agreed statement of facts, Utica Motor Car Corporation had sold the automobile under a condition sale contract to one DiBendette. The claimant for value and in good faith had purchased the rights of the vendor under said contract. There remained due thereon the sum of $328.30. Both the vendor and the claimant acted in good faith, and were innocent of any knowledge that the car was to be used to transport liquor illegally. DiBendette lent the vehicle to two friends, Lamonica and Calabresse, for the express purpose of bringing a load of grapes from Rochester to Utica in the State of New York. Without his consent or knowledge, these two men used the car to transport twenty five-gallon cans of ethyl alcohol. On October 6, 1926, in the City of New York, the vehicle was stopped by a city policeman, who arrested the two men and seized the alcohol and the vehicle. The following day the two men were arraigned before a United States commissioner on a complaint filed by the police officer charging them with the unlawful possession and transportation of the intoxicating liquor found in said vehicle in violation of the Prohibition Act. They were held by the commissioner on these charges, and on November 9, 1926, an information was filed against them by the United States Attorney. On the day on which they were arraigned before the commissioner, the automobile was taken by an agent of the Federal Prohibition Ad-

ministrator and placed in storage in a warehouse rented by said administrator. On December 9th, 1926, the United States Attorney filed this proceeding to condemn the vehicle under Sec. 3450. On this date Lamonica and Calabreese had not been tried upon the information charging them with violating the Prohibition Act. It does not appear what, if anything, has subsequently occurred in that prosecution. The cans of alcohol seized in the vehicle bore no stamps, marks, brands or labels indicating tax payment or compliance with the requirements of the Prohibition Act. Lamonica and Calabreese say they were not aware of any tax on distilled spirits or intoxicating liquors.

The order appealed from decreed that all right, title and interest of the claimant in the vehicle in question be condemned as forfeited to the United States.

DUANE R. DILLS, Esq.,
FRANK H. TOWSLEY, Esq.,
Attorneys for Appellant.

EMORY R. BUCKNER, United States Attorney,
C. D. WILLIAMS, Assistant U. S. Attorney,
For Appellee.

SWAN, Circuit Judge.

The libel was brought under Section 3450 of the Revised Statutes, which provides:

> "Whenever any goods * * * in respect whereof any tax is or shall be imposed * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax * * * every * * * conveyance * * * used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

We must take it as established that the alcohol found in the automobile, whether legally or illegally made, was subject to the basic production tax. *United States* v. *One Ford Coupe Automobile,* 272 U. S. ——, 47 Sup. Ct. 154, decided Nov. 22, 1926. The illegal possession of liquor in five gallon packages, bearing no stamp or mark indicating payment of the required tax, is presumptive evidence that the tax was unpaid. See *Master* v. *United States,* 284 Fed. 487 (C. C. A. 4th); *United States* v. *Sykes,* 58 Fed. 1000, 1004 (D. C.); *Seiden* v. *United States* (C. C. A. 2, not yet reported); Secs. 3289, 3333 Rev. Stat.

The alcohol was being concealed and removed in the vehicle, and there was evidence from which an intent to defraud the United States of the tax thereon could properly be found by the District Court. Concealment and removal of the tax-unpaid goods by illegal transportation in the automobile were presumptive evidence of an intent to defraud the United States of the tax thereon, despite the statements of the persons in charge of the vehicle, that they were ignorant of the law imposing such tax. The fact that their primary interest may have been to violate the Prohibition law need not prevent the court from inferring an intent also to evade the Tax law, as such evasion would necessarily result from their concealment and removal of the alcohol. *United States* v. *One Cadillac Automobile, &c.,* 292 Fed. 773 (D. C.); *United States* v. *One White One-Ton Truck,* 4 Fed. (2d) 413 (D. C.); *The Ella,* 9 Fed. (2d) 411. The decree must be sustained, therefore, unless the agreed facts render Sec. 3450 inapplicable. Indeed, the correctness of the decree if this section be applicable was not disputed.

The sole question presented and argued was whether the pendency of a prosecution of the persons in charge of

the vehicle for violation of the National Prohibition Act precluded the United States from seeking a forfeiture of the vehicle under Sec. 3450. This question was expressly left open by the Supreme Court in its opinion in *Port Gardner Investment Co.* v. *United States,* 272 U. S. ——, 47 Sup. Ct. 165, decided Nov. 23, which held that after conviction of the automobile driver, the disposition of the vehicle prescribed in Sec. 26, Title II, National Prohibition Act, became mandatory, and being inconsistent with the disposition under Sec. 3450, precluded resort to proceedings under the latter section.

Said Sec. 26 provides:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any * * * vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle * * * and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title * * *; but the said vehicle * * * shall be returned to the owner upon the execution by him of a good and valid bond * * *. The court upon conviction of the person so arrested * * * unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale * * * shall pay all liens, according to their priorities. * * *"

The Willie-Campbell Act (Act of November 23, 1921, Ch. 134, C. 5, 42 Stat. 222) has continued in force or re-en-

acted all laws in regard to taxation of intoxicating liquor not directly in conflict with the prohibitory legislation. In the *Ford Coupe* case, *supra,* it was held that there was no direct conflict between Sec. 26 of the Prohibition Act and Sec. 3450 of the Rev. Stat., as applied to the facts then before the court.

Mr. Justice Brandeis said (p. 158) that it is clearly possible to apply to a particular state of facts either one or the other remedy, and to give the government the choice. But in reply to the argument that the commencement of proceedings under Sec. 26 barred the government from electing to proceed under Sec. 3450, he said further that no election of remedies was involved because Sec. 26 is applicable only if a person is discovered in the act of transporting liquor illegally, and there was no allegation of transportation in the libel before him. His opinion closed with the statement:

> "There is no allegation that Killian, who had possession of the automobile, has ever been so prosecuted. It appears that a complaint was made, but not that a warrant issued, or that he was arrested, or even that he was found. The motion to quash must be determined on the showing the libel."

In the case at bar are present all the facts alluded to by Justice Brandeis as missing in the case under consideration by him. Lamonica and Calabreese were discovered in the act of transporting liquor in violation of law. Forthwith, under Sec. 26, it became the duty of the officer to seize the liquor, to take possession of the vehicle, to arrest the persons in charge thereof, to proceed at once against them "under the provisions of this title," and to hold the vehicle (unless the owner should give bond) to abide the result of

the trial of the persons arrested. All of these duties were fully performed except the last mentioned. That duty has been violated if it be assumed that the Prohibition Administrator ceased, on December 9, 1926, to hold the vehicle to await the outcome of the prosecution and thereafter held it under the provisions of Sec. 3450. In these circumstances, we believe there is a direct conflict between the two sections in question, and that Sec. 26 must control the disposition of the vehicle. This view was very clearly stated by Mr. Justice Stone in his concurring opinion in the *Ford Coupe* Case. The same view is expressed by Mr. Justice Butler in his concurring opinion in *Port Gardner Investment Co.* case, *supra.*

Counsel for the United States appears to concede the correctness of this position, saying that it is extremely difficult to escape the conclusion that Sec. 26 commands, when the given state of facts exists, a proceeding under its own terms. He then argues that Sec. 26 is applicable only when the discovery of the act of illegal transportation is made by a federal officer, not when made by a city policeman.

We should hesitate to adopt a construction of the statutes which would leave the determination of which section is applicable to the mere accident of whether the discovery of the violation of law were made by a federal officer or by a state officer. If the phrase "any officer of the law" as used in Section 26 should, as argued, be construed not to include a city policeman, nevertheless his discovery may be adopted by the United States as well as may his seizure. See, *Dodge* v. *United States,* 272 U. S. ....., 47 Sup. Ct. 191, decided Nov. 23, 1926.

When persons in charge of a vehicle used for the illegal transportation of liquor have been arrested and prosecuted

by the government for violation of the Prohibition Act, Sec. 26 plainly directs that the proceedings shall be carried through to a forfeiture of the vehicle under the terms of that section, which saves the rights of innocent owners and lienors. It is settled that after the conviction of such persons, forfeiture under Sec. 3450 is forbidden. To say it is permitted during the pendency of the prosecution and up to the moment of conviction, would be most inequitable to innocent owners and lienors, and would put a premium upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons. We do not find in the Supreme Court decisions anything which compels us to take this view.

The decree is reversed and the libel dismissed with costs to the appellant.

Judge Hough concurred in the result, but owing to absence, has not seen this opinion.

In the

Supreme Court of the United States

October Term, 1927.

No. [redacted]

COMMERCIAL [redacted] COMPANY
(a corporation),

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

[redacted]
Counsel for Appellant,
[redacted]
New York City.

[redacted]
[redacted]

[redacted]
[redacted]

[redacted]
[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

COMMERCIAL CREDIT COMPANY (a corporation), Appellant, *v.* THE UNITED STATES OF AMERICA, Appellee.	No. 258

BRIEF FOR APPELLANT.

Decision Below.

The decision of the United States Circuit Court of Appeals in this case is reported—*Commercial Credit Company* v. *United States*, 17 Fed. (2d) 902.

The decision of the United States District Court is not reported, and may be found in the record (Pages 37-39).

Question at Issue.

Practically the only question to be determined in this case is the one which was expressly left open by this court in *United States* v. *One Ford Coupe*, 272 U. S. 321, and *Port Gardner Investment Company* v. *United States*, 272

U. S. 564, and which is referred to by Mr. Justice Butler in his concurring opinion in the *Port Gardner Investment Company* case as follows:

> "The substance of that question is whether the prohibition officer, discovering one in the act of transportation, may disregard the plain and direct commands of Section 26 to proceed against the vehicle as there directed."

Statutes Involved.

The two principal statutes involved in this cause are Section 26 of the National Prohibition Act, and Section 3450 of the Revised Statutes, which read as follows:

> "National Prohibition Act, Title II.
>
> *Chap. 85, Act Oct. 28, 1919; 41 Stat., L. 305, 315.*
>
> Sec. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with suffi-

cient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Revised Statutes.

Sec. 3450 of the Revised Statutes. (Removing and concealing articles with intent to defraud United States of tax—forfeiture and penalty.) Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses

of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct."

Statement.

On November 23, 1925, an information was filed and libel issued out of the District Court of the United States for the Western District of Washington, Northern District, for and on behalf of the United States against one Ford Coupe, Motor No. 10587243, and against all persons lawfully intervening for their interest therein, and praying for the forfeiture of said Ford Coupe because it was used in the removal, deposit and concealment of intoxicating liquor with the intent to defraud the United States of a tax thereon (R. 3).

On December 16, 1925, appellant filed in the said District Court claim for the said Ford Coupe (R. 6) and made answer to the libel (R. 13), which answer was amended (R. 16-19), and on January 4, 1926, the Ford Coupe was released into the custody of appellant upon the giving of a bond for $500 (R. 2); trial by jury was waived and the cause was tried on its merits on March 29, 1926, before the Honorable George N. Bourquin, District Judge, and final decree was entered in the said District Court on May 5, 1926, in which it was ordered, adjudged and decreed that the motion of appellant to dismiss the libel be denied, and that the said Ford Coupe, its tools and accessories, be condemned and forfeited to the United States and forthwith

sold (R. 46). The opinion of the District Court is found in the record (pp. 37-39); the decree on page 46.

Notice of appeal to the Circuit Court for the Ninth Circuit was filed on May 13, 1926, and among its assignment of errors appellant set forth as follows (R. 50-51):

> "(8) The Court erred in not dismissing libellant's case for the reason that the automobile involved herein was subject to forfeiture only under Section 26 of the National Prohibition Act inasmuch as the record shows that W. G. Campbell, the man driving the car at the time of its seizure had been charged and convicted under the terms of the National Prohibition Act and that by virtue thereof the automobile herein was convicted at one and the same time.
>
> "(10) The Court erred in entering a decree of forfeiture herein for the reason that there is no evidence whatsoever in the record to show that the automobile was being used for the removal, concealment, or deposit of intoxicating liquor with an intent to defraud the United States of a tax due thereon."

The said appeal was heard by the Circuit Court of Appeals for the Ninth Circuit as case No. 4916, and the said court affirmed the judgment of the District Court (R. 78).

An opinion was rendered with reference to said decree (R. 71) and a stay of mandate was granted pending the filing of a petition for writ of certiorari in this court, which was filed May 19, 1927, and was granted by this court on October 10, 1927.

Appellant is a Delaware corporation with its principal office at Baltimore, Maryland and branch offices and sub-

sidiary companies throughout the United States, with a branch office at Seattle, Washington, in which state it was duly qualified to conduct business. Appellant is engaged among other things in the business of financing the sale of automobiles on the deferred payment plan by purchasing or otherwise acquiring from automobile dealers conditional sale contracts or other instalment obligations given to automobile dealers by the retail purchasers of automobiles. Appellant is a substantial company with capital and surplus of over $30,000,000 and total resources of about $100,000,000. It numbers among its directors and officials men of recognized business and financial integrity. Its operations and those of companies similarly situated form a necessary link between banks and the automobile manufacturing industry, now the largest industry in the United States and generally believed the largest in the world. Its business has been referred to as "an intensive part of our commercial banking system". See Federal Reserve Bulletin, January, 1923, on "Finance Companies", and World's Work Magazine, October, 1925, page 575. Over 4,000,000 automobiles are sold annually within the United States, and it is estimated that at least 75% of these are sold upon the deferred payment plan, under which the automobile dealers reserve title to or lien upon the automobiles by conditional sale contracts or other instruments. The method of operation is that the finance companies, such as the appellant, purchase or discount the conditional sale contracts from or for the automobile dealers, and then in turn rediscount with banks or hypothecate with trust companies such conditional sale contracts, issuing against them collateral trust notes, which in turn are bought by banks throughout the United States. One thousand such active finance companies in one

year, it has been estimated, employed in capital and borrowings in this industry of financing the sale of automobiles, over two billion dollars ($2,000,000,000).

It is impossible for the automobile dealers and for the finance companies at the time of a sale of an automobile and the execution of a conditional sale contract by the purchaser thereof, to know the uses to which the automobile will actually be put. Such finance companies and dealers, however, uniformly provide in their contracts of conditional sale that in the event the automobile is used for the transportation or possession of liquor in violation of law, that the conditional vendor or his assignee (the finance company) may repossess the automobile, and all rights of the offending purchaser therein shall thereupon become forfeited (R. 10, 11, 20, 21, 66, 67). See also testimony (R. 32).

The usual investigation was made before the financing of the sale of the Ford Coupe by appellant to ascertain the moral and financial risk of the purchaser (R. 33). It is conceded that appellant is an innocent owner or lienor within the meaning of Section 26 of the National Prohibition Act, and if the proceedings to forfeit the said automobile had been brought under Section 26 of the National Prohibition Act, its interests would have been protected; whereas under Section 3450 its interests in the said Ford Coupe were forfeited, notwithstanding its innocence.

The Howard Motor Company, an automobile dealer at Seattle, Washington, on or about November 14, 1924, sold the said Ford Coupe to W. G. Campbell, under a conditional sale contract, under which title was reserved to the conditional vendor until all payments thereon were fully made. The Howard Motor Company on the same date, for valuable consideration, assigned the conditional sale contract to

appellant. At the time of the assignment of the conditional sale contract to appellant, there was due and owing upon it by said Campbell $607.19, and at the time of the seizure of said automobile by appellee, there was due and owing to appellant by said Campbell $101.18. Appellant intervened in the proceedings to forfeit said automobile as an innocent owner or lienor, and claimed protection according to Section 26 of the National Prohibition Act, and established evidence to conform with said Act (R. 31-35).

At the same time another proceeding with reference to a Gardner car was pending before the same District Court, and in which appellant had also intervened (R. 37-39). The decision of the District Court with reference to the Ford Coupe involved in this action and the Gardner car were rendered prior to the decisions of this court in *United States* v. *One Ford Coupe,* and *Port Gardner Investment Company* v. *United States.*

The decision and decrees of the District Court in reference to both the Gardner car and the Ford Coupe were taken before the Ninth Circuit Court of Appeals. The Ford Coupe involved in this case was there known as Case No. 4916, and the Gardner car as Case No. 4915. The Circuit Court reversed the District Court on the strength of the holding of this court in *Port Gardner Investment Company* v. *United States* with respect to the Gardner car (see *Commercial Credit Company* v. *United States* (C. C. A. 9), 17 Fed. (2d) 483); but affirmed the decision of the District Court with reference to the Ford Coupe involved in this action, 17 Fed. (2d) 902, and in its opinion the Circuit Court distinguished this case from the one involving the Gardner car as follows:

> "This case differs in only one respect from that bearing the same title and numbered 4915, decided

February 14, 1927 (17 Fed. (2d) 483), in that the driver of the seized automobile, although charged with both illegal possession of intoxicating liquor and transportation thereof, was prosecuted only for the offense first named, upon plea of guilty and conviction of which the government dismissed the other charge."

Counsel for the appellant and for the Government in the proceedings before the District Court stipulated as follows (R. 31):

> "Mr. Kennett: It is further stipulated as a part of the claimant's case between the counsel for the Government and myself that the man driving this car, W. G. Campbell, was charged under the National Prohibition Law in cause number 10223 of the records of this court with unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved.
>
> "Mr. Simon: It is so stipulated."

The evidence of the Government in this action was by testimony of Matthew Ryan, United States Custom Inspector, who testified as follows:

> "Q. Will you state to the Court the circumstances under which you made that seizure?
>
> A. Why, the coupe was reported to me as handling a lot of Canadian liquor, distributing it around town, and I had watched it a couple of times before I seized it make deliveries. It belonged to a man who lived up on Summit Avenue North about the 400 block. He used to park it in the alley back of his house and—so one evening I was coming by, I think it was the 9th of October.

Q. The 9th of October of last year?

A. Yes. And I decided to stop and catch him, so Inspector McTague was with me and we stopped there and he came out of the house and looked around and got into the coupe and started the motor and started to back out of the alley and I stopped him and told him I would like to search his car, told him who I was, and he says, 'All right,' so we opened up the back end of it and there was no liquor in there, we opened up the front door and the seat, there was only one seat in the car, the right-hand side was on a hinge and it was cut in the middle and just lifted up on a hinge, and there was thirteen quarts of liquor under the seat, so I arrested him and took him down to the immigration station and put the car in the appraisals warehouse.

Q. What kind of liquor was this?

A. I think there was three quarts of gin and ten quarts of whiskey.

Q. Did the bottles contain revenue stamps showing tax paid to the United States?

A. No, sir.

Q. You took the car into your possession at that time?

A. Yes, sir."

* * * * * *

"Cross-examination.

Q. Was that liquor fit for beverage purposes?

A. Yes, sir.

Q. And the largest container of any of them—they were all quart bottles, I understand?

A. All quart bottles, yes, sir."

* * * * * *

"The Court: What kind of liquor was it; local or——

The Witness: No, sir; there was three quarts of Old Pensioner Gin that were supposed to be the

produce of England, and six quarts of Perfection Scotch Whisky, and three quarts of Dunbar's Gold Label Scotch Whisky, and one quart of Cato's Gold Scotch Whisky.

The Court: What do you mean by Scotch Whisky?

A. That is what is said on the bottle.

The Court: Did it give any name of the maker?

The Witness: Yes, sir.

The Court: What were they?

The Witness: Well, this Dunbar's was supposed to be made in Scotland. It said on the bottle 'Produce of Scotland', and the same way with the Perfection. I don't remember the names of the makers, but the Prohibition Department has the evidence.

Q. Did you make any investigation to ascertain whether or not those were genuine liquors or whether they were moonshine and fake labels?

A. No, sir, I did not.

Q. You don't know, as a matter of fact, whether those liquors were manufactured and produced abroad, do you?

A. No, sir, on what it said on the bottle" (R. 24-28).

The only evidence as to the failure to pay taxes introduced by the Government was the testimony of W. M. Whitney, Deputy Collector of Internal Revenue. He testified that the tax had not been paid in his district, because there had been no taxes on liquor paid in that district within the last four years, but that he did not examine the records of any other district (R. 28-29).

ARGUMENT.

I.

Proceedings under Section 26 of the National Prohibition Act were mandatory.

The mandatory provisions of Section 26 of the National Prohibition Act were called to the attention of this court at the first argument and the reargument of *United States* v. *One Ford Coupe* and *Port Gardner Investment Company* v. *United States*. From the majority and dissenting opinions in *United States* v. *One Ford Coupe*, and the majority and concurring opinions in *Port Gardner Investment Company* v. *United States*, it is evident that the question of the statute being mandatory was fully and ably considered by this court. Since these decisions there has been very little if any contribution from the District or Circuit Courts that would be of any assistance in a further consideration of the mandatory features of that statute. For the convenience of the court we quote from the brief filed at the time of the original argument in the *Ford Coupe* and *Port Gardner Investment Company* cases by the same counsel now appearing for the appellant in this action.

"The provisions of that section are specific and mandatory, and require—

(a) That the officer upon seizing the intoxicating liquor transported or illegally possessed shall—
   1. Take possession of the automobile.
   2. Arrest the person in charge thereof.
   3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) The court, upon conviction of the person, shall—
1. Order the liquor destroyed.
2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) The officer carrying out the execution of the court shall—
1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which shall be established by intervention or otherwise; and further that all liens against the property sold shall be transferred from the property to the proceeds of sale.

The re-enacting clause of Section 5 of the Supplemental Act provides:

> 'but if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.'

Once a person is charged with a violation of the National Prohibition Act, or an officer finds the liquor being transported or possessed by a person in the automobile, the procedure against both the person and the vehicle must be under the provisions of the National Prohibition Act, and if the person is convicted under the provisions of that act, there is ipso facto a conviction or a forfeiture of the automobile insofar as the convicted law violator's interests are concerned.

In United States *v.* Torres, (Md.) 291 Fed. 138, the court says:

'The person and the vehicle were convicted at one and the same time under Section 26. The plea of guilty of Torres established the guilt of the car. In other words, there has already been, as respects the automobile, a conviction for the offense under the National Prohibition Act, and such conviction is a bar to prosecution under Revised Statutes 3450.'

See also—

The Spray (R. I.) 6 Fed. (2) 414.

United States *vs.* One Ford Automobile, Commercial Credit Company, Intervenor, District Court of Tennessee. Not yet reported.

It follows as a matter of logic that where the rights of innocent parties must be determined under the National Prohibition Act if the law violator has been convicted, equally must they be protected under the provisions of that act where the law violator has escaped or where he has been acquitted. As was said in the case of United States *v.* One Reo Truck (C. C. A. 2), (9 Fed. (2) 529):

'Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it possible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the

> bona fide lienor to a penalty from which he would be exempt in case of conviction.'

This court, in the case of Coffey *vs.* United States, 116 U. S. 436, at page 443, has said:

> 'It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*' "

The Ninth Circuit Court of Appeals distinguished this case involving the Ford Coupe from another case involving a Gardner car heard at the same time (*Commercial Credit Company* v. *United States*, 17 Fed. (2d) 483) and affirmed the District Court in this case (17 Fed. (2d) 902) because of the fact that the driver of the Ford Coupe was convicted of possessing intoxicating liquor in violation of the National Prohibition Act, instead of being convicted of transporting the liquor as in the case of the Gardner car. The charge against the driver of the Ford Coupe was for both transportation and possession in violation of the Prohibition Act (R. 31), but upon pleading guilty of the charge of

possession, the Government withdrew the charge of transportation and the Circuit Court says:

> "While the section (Section 26) in directing that the officer shall take possession of the vehicle makes use of the words 'transported or possessed', when referring to the liquor discovered in process of transportation, it is quite clear that the gravamen of the offense is the unlawful transportation, and that the disposition of the vehicle therein provided refers to this element of the transaction. The statute elsewhere (Section 3 of title 2 thereof) makes possession of intoxicating liquor an offense for which a punishment is provided by Section 29 of title 2. We do not think that Congress, having provided for the forfeiture of the offender's interest in the vehicle as a penalty for transportation, and a different punishment for unlawful possession of intoxicating liquor, intended to create a third offense, namely, possession in transportation, the penalty for which would include a forfeiture already incurred by reason of the act of transporting."

In Section 3, Title II, of the National Prohibition Act, is found the following:

> "No person shall * * * manufacture, sell, barter, *transport*, import, export, deliver, furnish or *possess* any intoxicating liquor * * *."

Section 29 of the same Act provides:

> "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more

than $2,000, and be imprisoned not less than one month nor more than five years.

"Any person violating the provisions of any permit, or who makes any false record, report or affidavit required by this title, or violates any of the provisions of this title, for which offense a special punishment is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than 90 days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. * * * "

In Section 26 of the National Prohibition Act is found the following:

"Whenever intoxicating liquors *transported* or *possessed* illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

While the word "possess" appears in Section 3, to which the Circuit Court refers, so does the word "transport". The word "possess" appears in Section 26, but does not specifically appear in Section 29. Section 29 primarily has to do with punishment for manufacturing and selling liquor. Possession, if not for the purpose of manufacture or selling, would not be punishable under Section 29, except for the omnibus clause appearing therein, reading as follows:

"violates any of the provisions of this title, for which offense a specific penalty is not prescribed."

In *United States v. One Ford Coupe,* in the majority opinion of Mr. Justice Brandeis, it is said:

> "The case at bar does not present any conceivable question of cumulative remedies or of election. *While the second sentence in Section 26 uses the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation.* Hence that section is applicable only if the person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used. There is no allegation that Killian, who had possession of the automobile, has ever been prosecuted. It appears that a complaint was made but not that a warrant was issued, or that he was arrested or even that he was found. The motion to quash must be determined on the showing of the libel." (Italics ours.)

It is evident that Mr. Justice Brandeis did not intend to interpret the word "possess" in Section 26 as creating a different offense than the word "possess" in Section 3. It seems clear that Mr. Justice Brandeis meant that if the liquor was being transported, that the possession was possession incidental to the transportation and was merged therein. So that when a charge of possession and a charge of transportation is made against an offender under Section 3, Section 26 would still be applicable because the possession charged in Section 3 would mean the possession in transportation under Section 26, to which Mr. Justice Brandeis refers.

The Circuit Court of Appeals for the First Circuit takes this view of the interpretation of the words "possess" and

"transport" in Section 3, in *Brown* v. *United States* (C. C. A. 1) 16 Fed. (2d) 682. The defendant had been indicted on three counts, to wit, for transporting, possessing and importing liquor. The defendant moved that the Government should elect whether to submit a charge of transportation or a charge of possession, which was denied, and this was assigned as error. The Circuit Court said:

> "The testimony did not disclose any possession which was not incidental to transportation. While the boat had come to rest at her mooring at Raccoon Island, where she was pointed out to Brown by Hunt, the transportation had not ceased, but had been temporarily suspended, evidently awaiting directions from the defendant where the unloading should take place, and was to be resumed after these directions had been given.
>
> "The possession of the liquors was incidental to and involved in the act of transportation.
>
> • • • • • •
>
> "The sentence imposed upon the defendant by the court was the payment of a fine of $500 and imprisonment for the term of four months. The verdict returned by the jury was not a general verdict of guilty, but a verdict of 'Guilty of all three counts'. The defendant was therefore found guilty under the first count and as there was, in our opinion, sufficient evidence to sustain this verdict and insufficient to sustain the third, while the second count, charging possession, was merged in the first, we have reached the conclusion that the judgment of the District Court should be reversed, and the case remanded to that court, in order that the defendant may be resentenced upon the verdict of guilty returned under the first count."

The Circuit Court of Appeals for the Second Circuit, in *Schroeder* v. *United States*, 7 Fed. (2d) 60, had occasion to consider the effect of the words "possession" and "transportation", and said, at page 65:

> "It is, however, assigned for error that the court erred in imposing sentence on both counts of the information. In this we concur, and think that what the court did amounted to imposing a double sentence for a single offense. The same facts proved unlawful possession and unlawful transportation. The only act of possession testified to was the possession necessarily involved in the transportation which was the subject of the second count. * * * The possession was necessary and incidental to the act of transportation. There may be, and commonly is, possession which is distinct from transportation.
>
> "Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double (Citations). And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. * * *
>
> "The conviction and sentence under the first count is set aside."

Unquestionably the possession of the intoxicating liquor in this case was incidental to the transportation. The liquor was discovered when the car transporting it was stopped by the officers. The liquor was possessed as an

incident to transportation, and it was the possession "in transportation" to which Mr. Justice Brandeis refers. It follows, therefore, that the mandatory features of Section 26 were applicable.

The Circuit Court of Appeals for the Second Circuit has held that under such circumstances Section 26 is mandatory, and is in direct conflict with Section 3450 R. S. That court said, in *Commercial Credit Corporation* v. *U. S.* (C. C. A. 2) 18 Fed. (2d) 927:

> "Lamonica and Calabresse were discovered in the act of transporting liquor in violation of law. Forthwith, under Section 26, it became the duty of the officer to seize the liquor, to take possession of the vehicle, to arrest the persons in charge thereof, to proceed at once against them 'under the provisions of this Title', and to hold the vehicle (unless the owner give bond), to abide the result of the trial of the persons arrested. * * * That duty has been violated if it be assumed that the Prohibition Administrator ceased on December 9, 1926, to hold the vehicle to await the outcome of the prosecution and thereafter held it under the provisions of Section 3450. In these circumstances, we believe there is a direct conflict between the two sections in question, and that Section 26 must control the disposition of the vehicle."

II.

The facts do not justify forfeiture under Section 3450.

According to the record in the case, the car was not smuggling liquor into the country, although the liquor found in the car bore labels to the effect that the liquor had been produced in Scotland and England. The liquor was in quart bottles.

Section 3289 of the Revised Statutes, Compiled Statutes Section 6030, provides:

> "All distilled spirits found in any cask or package containing *five gallons or more,* without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

Section 3320, as amended by Act of July 16, 1892, and as further amended by Act of Congress August 27, 1894 (Compiled Statutes Section 6102), is in part as follows:

> "Whenever any cask or package, containing *five gallons or more,* is filled for shipment, sale, or delivery on the premises of any rectifier who has paid the special tax required by law, it shall be inspected and gauged by a United States gauger whose duty it shall be to mark and brand the same and place thereon an engraved stamp, which shall state the date when affixed and the number of proof gallons. * * *"

Section 3323 Revised Statutes, as amended July 16, 1892, 27 Statutes 200, Compiled Statutes 6104, provides that:

> "Every package of distilled spirits containing *five wine gallons or more*, filled on the premises of a wholesale liquor dealer, who has paid the special tax required by law, shall be marked, branded, and stamped by such wholesale liquor dealer * * *."

The liquor in the instant case was not in containers of five gallons, but rather in quart bottles, and the law therefore presumes that the tax, at least the basic tax, on the liquor had been paid. The only tax that could be therefor considered would be the added tax or penalty of $4.20 for divergence of the liquor from non-beverage to beverage purposes, and there was no evidence in the record of that divergence, or at least of the divergence referred to in the statutes. In *Duke* v. *U. S.* (C. C. A. 4th), 275 Fed. 142, at p. 148, the court said:

> "Therefore when distilled spirits were found in a vessel of less capacity than five wine gallons, the law presumed that it was tax paid, and the burden was upon the party alleging the contrary to prove it, and in a criminal case to prove it to the satisfaction of a jury beyond a reasonable doubt."

and *Hester* v. *U. S.* (C. C. A. 4th), 284 Fed. 487, the court said:

> "In this case the spirits covered by the indictment consisted of less than five gallons, namely, a quart, and the defendant is entitled to the benefit of the presumption that the tax has been paid."

The gravamen of the offense under Section 3450 is the intent to defraud of the payment of a tax. If the tax on containers of less than five gallons is presumed to have been paid, it is difficult to understand how the intent to defraud

the Government of a tax can be presumed so as to warrant forfeiture under Section 3450. This point is raised to throw greater light upon the meaning of Section 3450, and not to make unnecessary refinements on that statute. Indeed, appellant would greatly regret if the decision in this case should be made only upon the fact that the containers were less than five gallons. A great many cases are now blocking the court calendars, involving confiscation of automobiles, and the instant case involves a very small sum, only $101. We frankly admit it is brought before this court for enlightenment as to what the rights of innocent parties are in the premises generally, and particularly as to the mandatory features of Section 26. Consideration of the point, however, is necessary because of the confusion in both the District Court and in the Circuit Court on the question of taxes, where both of these courts assume that the taxes were not paid because no taxes had been paid upon imported liquor within the district for a period of four years, and the quart bottles containing the liquor bore brands or labels representing it to be of foreign manufacture. The testimony, however, clearly establishes that the prohibition agent did not know whether or not the labels on the liquor were false; did not know whether the liquor was in fact of foreign make, and did not know whether the liquor had been imported in any district other than the district in which the examination had been made; that the agent did not know whether or not the liquor had been in a bonded warehouse prior to the adoption of the National Prohibition Act, and whether or not it might have been subsequently diverted from such a bonded warehouse.

If for the sake of argument, however, it should be said that the liquor was of foreign manufacture, and had been

smuggled into the country, nevertheless there would not have been sufficient ground for forfeiture of the automobile, because it would have been necessary to prove that the particular car in question had been employed in the smuggling of the liquor into the country.

In *National Bond and Investment Company* v. *United States* (C. C. A. 7), 8 Fed. (2d) 942, the court had under consideration the forfeiture of an automobile for alleged violation of the Customs Act, where it was shown that the liquor had been manufactured in Canada and had been brought into the country subsequent to the adoption of the National Prohibition Act, and that the customs duties had not been paid thereon. The court there said:

> "It does not appear from this that the coupe was used to bring liquor into the United States, nor is there any evidence on the question of intent. * * * Intent cannot be shown without showing intent of the user in the use of the car. There is nothing in the evidence from which the necessary intent can be inferred. Intent to defraud the United States out of customs duty may be inferred when a conveyance is used to smuggle goods into the United States, but to warrant such inference it must be established that the conveyance was so used."

There is no evidence in this case that the automobile in question was used in bringing the liquor into the United States. Furthermore, the libel was so framed as to charge violation of Section 3450 of the Revised Statutes, because the car was alleged to have been used to remove, conceal, and deposit the liquor with intent to defraud the United States of a tax thereon, and if the liquor be considered as of foreign manufacture, Section 3450 would not have been applicable.

The Circuit Court of Appeals for the Second Circuit in *The Squanto,* 13 Fed. (2d) 548, at 551, said:

> "The third cause of forfeiture cannot be sustained. It is based upon Section 3450 of the Revised Statutes, providing for forfeiture of any goods or commodities in respect whereof a tax is or shall be imposed, which is removed or concealed with intent to defraud the United States. The theory of the government is that the cases of intoxicating liquor were removed with intent to defraud the United States of the tax. The scope and reach of this section has no application to goods brought in from foreign ports, and we think refers only to articles produced within the exterior boundaries of the United States. The liquor on The Squanto was not produced within the United States but concededly without. Indeed, it was charged that it was imported into the United States. Its presence on board the Squanto could not form a basis of forfeiture for the alleged violation of this section."

III.

Forfeitures under Section 3450 R. S., instead of under Section 26 N. P. A., where transportation of liquors is involved, are against reason and justice.

A—Innocent parties suffer while guilty parties may escape.

> "A premium is put upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons." (18 Fed. (2d) 927.)

B—The punishment of the guilty person is limited while the forfeiture of the rights of the innocent person is unlimited.

C—The relief granted to innocent parties under Section 5292 R. S. in effect at the time of the *Goldsmith-Grant* case has been repealed, and the only protection now existing to innocent parties is under Section 26 N. P. A.

A.

A confusion seems to exist among the various circuits as to the rights of innocent parties in cases similar to the case now under consideration, because of the decisions of the United States Supreme Court.

In *Goldsmith-Grant Company* v. *United States,* 254 U. S. 505, this court extended the forfeiture of the rights of innocent parties beyond that which had previously existed. The decisions of this court prior to that time had upheld forfeitures of the rights of innocent parties, where those parties knew the purpose for which the property was to be used or had acquired the property from the prior offender after the offense had occurred. In such cases the property was considered as taken by the innocent party subject to the encumbrances thereon by its prior wrongful use. In the *Goldsmith-Grant* case, however, the property was not acquired by the innocent parties subsequent to its wrongful use, but the property interests of the innocent parties were in the property at the time of its wrongful use, and the wrongful use was made of that property against the wishes and without the knowledge of the innocent parties.

This court recognized that the arguments in behalf of the innocent parties in the *Goldsmith-Grant* case were "formidable". It there said:

> "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution."

At the time of the seizure of the automobile in the *Goldsmith-Grant* case, national prohibition was not effected. The case was therefore considered only as one in support and protection of the public revenue. The principle of law, however, established in the *Goldsmith-Grant* case has been further extended by this court in *Van Oster* v. *The State of Kansas,* 272 U. S. 465. In this latter case the court has held that the proceeding against the car, being one *in rem,* and the proceeding against the offending person, being one *in personam,* it followed that the forfeiture of the automobile, having preceded the acquittal of the individual, must be upheld. We have therefore the paradox in that case of the individual accused of transporting the liquor being found by a jury innocent of the charge, while the car in a prior proceeding *in rem* is found guilty of transporting the liquor. If, however, under the decisions of this court the individual charged with the offense had been acquitted prior to the forfeiture pro-

ceedings against the car, then in that case an acquittal of the individual in the proceedings *in personam* would have been *res adjudicata* to the proceedings *in rem* against the car, if the same person were the owner of the car.

This court, in *Coffey* v. *U. S.*, 116 U. S. 436, at page 443, said:

> "It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*"

It would be against reason and justice to say that the acquittal of the individual prior to the forfeiture of the car would protect the rights of the individual charged with the crime in the car, but would not protect the rights of the innocent party in that car.

The United States Circuit Court of Appeals for the Second Circuit, in *United States* v. *One Reo Truck*, 9 Fed. (2) 529, has said:

> "Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force

as against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it possible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the bona fide lienor to a penalty from which he would be exempt in case of conviction."

It is furthermore held by this court in *Port Gardner Investment Company* v. *United States,* that a conviction of the individual charged with transportation in violation of the National Prohibition Act prior to the forfeiture of the automobile makes it mandatory to proceed against the automobile under Section 26 of the National Prohibition Act, thus protecting the rights of innocent parties.

It is established, therefore, from the decisions of this court, that a conviction of the alleged wrong doer for transportation of intoxicating liquor will afford the innocent parties having rights in an automobile protection under Section 26; that an acquittal of the alleged wrongdoer in a criminal proceeding against him will protect his property rights in an automobile in a subsequent proceeding *in rem,* but that his acquittal subsequent to the forfeiture proceedings against the automobile will not protect the rights of innocent parties in that automobile in a prior forfeiture proceeding. In other words, some of the circuits have felt bound by the decisions of this court to hold that notwithstanding a car is seized while transporting intoxicating liquor, nevertheless forfeiture proceedings under Section

3450 may be instituted and prosecuted with effect, if the forfeiture is accomplished before the acquittal or conviction of the individual.

The Fourth Circuit Court of Appeals, in *United States* v. *Commercial Credit Company*, 20 Fed. (2d) 519, had this situation before it. In that case the District Court had dismissed the libel against the automobile brought under Section 3450 and an appeal was taken by the government to the Circuit Court. While the appeal was pending in the Circuit Court, the alleged wrongdoer, who was arrested at the time of the seizure of the automobile, was convicted upon the charge of unlawful possession and transportation. After the arrest of the individual and the seizure of the automobile, the individuals were bound over to the court for violation of the Prohibition Act, but before an indictment had been found or an information had been filed against them, the United States attorney had filed a libel against the automobile under Section 3450. The fact that the information had not been filed or the indictment had not been found, although the persons had been arrested prior to the dismissal of the libel for forfeiture under Section 3450, caused the Fourth Circuit Court of Appeals to distinguish that case from the decision of the Second Circuit Court of Appeals in *Commercial Credit Company* v. *United States*, 18 Fed. (2d) 927. The Fourth Circuit therefore said that the question was whether or not the arrest and seizure and the issuance of a warrant, and the binding of the individuals over by the United States Commissioner to the court, was a sufficient election by the government to make it mandatory that the proceedings against the automobile must be under Section 26. The Fourth Circuit felt constrained, because of the decisions of this court in *United*

States v. *One Ford Coupe,* and *Port Gardner Investment Company* v. *United States,* to hold that the libel should not have been dismissed because the individuals had not at that time been convicted. Since, however, the individuals had been convicted prior to the decision on the appeal to the Circuit Court the dismissal of the libel was affirmed because the Circuit Court said it would have been useless to send the case back to the District Court, since under the *Port Gardner Investment Company* case, the conviction in the meantime of the individuals would make it mandatory to proceed under Section 26 against the car in what then would be a forfeiture subsequent to conviction.

The deduction, however, to be drawn from the decision of the Fourth Circuit is that if the car had actually been forfeited by the District Court, instead of the libel having been dismissed prior to the conviction of the individuals, then under the decisions of this court in *United States* v. *One Ford Coupe,* and *Van Oster* v. *The State of Kansas,* the forfeiture of the automobile would have had to have been upheld, notwithstanding that under the *Port Gardner Investment case* a conviction before the forfeiture would have made the forfeiture under Section 3450 invalid.

In the case at bar the individuals had been informed against both for transportation and for possession, and it was only upon a conviction of possession that the charge of transportation was withdrawn. The withdrawal of a charge amounts, in substance, to the acquittal of the individual for transportation, the possession, being only, as hereinbefore pointed out, incidental to transportation.

The fact that the government may, by delaying criminal proceedings against the individual, work an injustice to the innocent owners by the forfeiture of their rights in the

automobiles, has led the Circuit Court of Appeals for the Second Circuit, in *Commercial Credit Corporation* v. *United States,* to denounce the procedure, when it says:

> "It is settled that, after the conviction of such persons, forfeiture under Section 3450 is forbidden. To say it is permitted during the pendency of the prosecution and up to the moment of conviction would be most inequitable to innocent owners and lienors, and would put a premium upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons."

The very fact that the Circuit Courts have been constrained to make this refinement in their interpretation of the law, because of the decisions of this court, warrant, we respectfully submit, a reconsideration by this court of the principles laid down in *Goldsmith-Grant Company* v. *United States* and the other cases involving the forfeiture of the rights of innocent parties. Certain it is that due regard should be given to the punishment and remedies provided in Section 26 of the National Prohibition Act, which have no relation to the ancient law of *deodand* but are based upon a modern conception of justice in that they carefully protect title and rights in property of all innocent persons, and provide for the forfeiture of the interests in the property of the guilty parties only.

B.

Furthermore, under the proceedings as now being followed by the government, the innocent suffer a greater punishment than do the guilty. A procedure under Section 3450 forfeits absolutely the rights of the innocent in the

automobile, notwithstanding the value of those rights, whereas the punishment of the individual under both Section 3450 and the National Prohibition Act limits the degree of punishment of the offending person. Under Section 3450 the individual, if prosecuted under that section, is limited to a fine or penalty of not more than $500. The section provides:

> "And every person who removes, deposits or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed with intent to defraud the United States of such tax or any part thereof shall be liable to a fine or penalty of not more than $500."

Section 29 N. P. A. provides that a person who manufactures or sells liquor shall for the first offense be fined not more than $1,000 or imprisoned for not more than six months; and for violation of any other provisions for which a specific penalty is not prescribed, a first offender shall be fined not more than $500. We might therefore very well have a case, as has happened in District Courts, where the interest of the innocent party in the automobile would be in excess of $1,000. The guilty first offender in that case would be fined under either Section 3450 R. S. or Section 29 N. P. A. not more than $500, while the innocent owner of property interests in the automobile would suffer the full forfeiture of his interests, which would be in excess of $1,000.

As an illustration, counsel for the appellant has had a case where an innocent lienor had an interest of $1,800 in an automobile, which would have been absolutely forfeited

under Section 3450, but for violation of the National Prohibition Act the offender had to pay only a nominal fine.

Any procedure or any state of law which countenances, let alone directs, a greater punishment upon the innocent than upon the guilty for the same offense is against reason and justice, and should not be countenanced by our courts.

C.

At the time of the decision of this court in *Goldsmith-Grant Company* v. *United States,* innocent parties were not entirely precluded from some relief where forfeitures were made, because under Section 5292 of the Revised Statutes they could, in proper cases, make application to the Secretary of the Treasury for the return of the forfeiture. The relief granted, however, by Section 5292 has now been taken from the innocent owners, because by Act of Congress, September 21, 1922, Chapter 356, Title IV, Section 642, 42 Statutes 989, repealing Section 5292 and like statutes. The only protection now afforded to innocent owners is that under Section 26 of the National Prohibition Act.

While the relief under Section 5292 was not discussed in the *Goldsmith-Grant* case by this court, it may well have been in mind, and the circumstances that that relief is now taken from the innocent owners and his only relief is in Section 26 of the National Prohibition Act, might well influence this court in holding that forfeitures, so far as

innocent owners are concerned, must be brought within the provisions of Section 26.

It is submitted that the decree of the United States Circuit Court for the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 256.

COMMERCIAL CREDIT COMPANY,
(A CORPORATION),
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 258.

COMMERCIAL CREDIT COMPANY,

PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

Statement.

In the petition for writ of certiorari we said that the question pressing for decision was that referred to by Mr. Justice Butler in his concurring opinion in *Port Gardner Investment Company vs. United States,* 272 U. S. 564, as to whether or not when an officer discovers a person transporting intoxicating liquor he may disregard the plain and direct commands of Section 26 of the National Prohibition Act to proceed against the vehicle as there directed. In other words, is Section 26 mandatory? That is the important question both the Government and the Petitioner are now desirous of

having answered in order to clear the confusion that exists in the District and Circuit Courts.

Compare:

United States vs. Commercial Credit Co. (C. C. A. 4), 20 Fed. (2d) 519;

Commercial Credit Corp. vs. United States (C. C. A. 2), 18 Fed. (2d) 927;

United States vs. Two Mack Trucks (D. C. E. D. Pa.) 20 Fed. (2d) 188;

The Jugoslavia (D. C. E. D. La.), 21 Fed. (2d) 99.

At the oral argument it was insisted that that is the only question that can now be considered. It is agreeable to us to have it so. The other points were raised in our briefs as a mater of duty so that the Court might be informed of all questions considered by the courts below.

The Record.

The Justices of this Court at the oral argument experienced difficulty with the precise question as disclosed by the record of this case. The Stipulation of Counsel (R. 31) may be subject to the criticism offered that the words "identical transaction" are not precise. It must be remembered, however, that this record was made before the decisions by this Court in *United States vs. One Ford Coupe* and *Port Gardner Investment Company vs. United States.* The records prepared in the *Second and Fourth Circuits* were clear and unambiguous, but, unfortunately, Petitioner won in both those Circuits and could not bring the question here. In the meantime, however, the case at bar was decided by the *Ninth Circuit* and it has thrown the general subject again into confusion.

It is apparent that both the District Court and the Ninth Circuit considered the car was seized while in the act of transporting intoxicating liquor. In the District Court decision (R. 38), Judge Bourquin says "also in October, 1925, the Ford car was seized in Seattle *while engaged in transporting quart bottles filled with liquor,*" (Italics ours) and in the Circuit Court (R. 71), Judge Kerrigan says "this case differs in only one respect from that bearing the same title and numbered, 4915, decided February 14, 1927, 17 *Fed.* (2nd) 483, in that the driver of the seized automobile, although *charged with both illegal possession of* intoxicating liquor *and transportation* thereof was prosecuted only for the offense first named." (Italics ours.)

The record we submit justifies the finding of fact by both the District and Circuit Court and that finding should be binding upon the Supreme Court. The record shows that the libel against the car was filed by C. T. McKinney, Assistant U. S. Attorney, alleging that the car was seized October 9, 1925, by William Whitney, Deputy Collector of Internal Revenue, for violation of Section 3450 R. S. (R. 3-4). The amended answer sets forth that if the automobile offended any law it was the National Prohibition Act and not Section 3450 (R. 18). The testimony of Customs Inspector, Ryan, was that the car had been transporting liquor and was transporting liquor at the time of its seizure. He says (R. 25):

> "I had watched it a couple of times, *before I seized it make deliveries* • • • and I decided to stop and catch him so Inspector McTague was with me and we stopped there and he came out of the house and looked around and got into the Coupe and *started the motor and started to back out of the alley and I stopped him.*" (Italics ours.)

While the libel states that the seizure was made by W. M. Whitney, the testimony of Whitney does not disclose that the direct seizure was made by him, although it does disclose that he was Deputy Collector of Internal Revenue and Assistant Prohibition Administrator (R. 28). Under the rulings in district and circuit courts, and we also take it by this Court, in *Dodge vs. United States,* 272 U. S. 530, the seizure can be made by "any officer of the law." Presumably, therefore, Whitney was Ryan's superior and for that reason his name appears in the libel. The expression appearing in the Stipulation of Counsel (R. 31) "the identical transactions here involved" appears throughout the record such as the amended answer (R. 18) and is intended to show that the testimony of Ryan (R. 25-26), "so I arrested him and took him down to the immigration station and put the car in the appraiser's warehouse" was the same identical act or series of acts which was the basis for the arrest of the driver for transportation and the libeling of the car for violation of Section 3450.

We trust that this will be sufficient to satisfy the Court that the precise question is now before it for decision.

ARGUMENT.

I.

The Statutes Are Mandatory And In Conflict.

The principal argument in the brief filed for the United States of America is that the word "shall" in Section 26 N. P. A. should be construed as "may" so that the statute might be considered as permissive in-

stead of mandatory. It is true that in some cases the word "shall" has been construed as "may" where the circumstances justified that construction. Such a case is Railroad Company vs. Hecht, 95 U. S. 168, cited by counsel for the government. But it is equally true that in many other cases, such as those statutes providing that instruments "shall" be acknowledged in a prescribed form, the courts have construed "shall" as mandatory. We need not examine those cases because we have a closer illustration of the mandatory effect of the word "shall" in section 3450 itself. It is because of the mandatory feature of that statute that this court has given full effect to the forfeitures provided for therein, although the forfeitures against innocent parties were harsh and unjust. If the word "shall" in that statute could have been construed as "may" it is apparent from the expressions in the opinions of this court that forfeitures of the property of innocent parties would not have been enforced in Dobbins Distillery vs. United States, 96 U. S. 395; Henderson Distilled Spirits, 14 Wall. 44, 81 U. S. 44; Goldsmith-Grant Co. vs. United States, 254 U. S. 505, and the other cases of like effect.

We do and always have insisted that section 3450 is mandatory notwithstanding the statement to the contrary on page 13 of the brief for the United States We also insist that section 26 is mandatory. And when, as in the case now at bar, you have two mandatory statutes giving opposing commands in respect to the same act or transaction, then those statutes are in conflict. Here the liquor in the car may have been "concealed and removed" with intent to defraud of a tax in violation of section 3450, and at the same time "possessed and transported" in violation of the National Prohibition Act. Then you have both section 3450 and

section 26 commanding seizure and forfeiture. But there can be only one forfeiture of the car. So the statutes are in conflict. And being in conflict, section 3450 was not re-enacted by the Willis-Campbell Act because of its express terms. Supplemental Act of 1921, chap. 34, Act Nov. 23, 1921, 42 Stat. L. 222, 223. Therefore, section 3450 is repealed, in so far as the circumstances of this case are concerned, because of the general principles of law in *United States vs. Yuginovich,* 256 U. S. 450.

Commercial Credit Co. vs. United States (C. C. A. 6), 5 Fed. (2) 1;

Lewis vs. United States (C. C. A. 6), 280 Fed. 5;

Commercial Credit Corporation vs. United States (C. C. A. 2), 18 Fed. (2) 927;

United States vs. One Reo Truck (C. C. A. 2), 9 Fed. (2) 529;

United States vs. One Ford Coupe (C. C. A. 5), 4 Fed. (2) 528;

One Ford Touring vs. United States (C. C. A. 8), 284 Fed. 823;

McDowell vs. United States (C. C. A. 9), 286 Fed. 521.

See also—

Reed vs. Thurmond (C. C. A. 4), 269 Fed. 252;

United States vs. One Haynes Auto (C. C. A 5), 274 Fed. 926;

Farley vs. United States (C. C. A. 9), 269 Fed. 721;

Ketchum vs. United States (C. C. A. 8), 270 Fed. 416.

Section 26 by its terms is mandatory. It is not a question, which statute the government, by its District Attorneys or other officers, may elect to enforce. No officers are authorized to make an election where there has been transportation. Section 26 itself makes the election.

II.

Interpreting Section 26 as Mandatory Will Not Affect the Customs Statutes.

In pages 8 to 11 of the brief for the United States great stress is laid upon the embarrassment and consequences that will follow as to the customs acts if section 26 is held to be mandatory. The fears of counsel for the government in that respect are not well founded. The Tariff Act of 1922 was enacted after the National Prohibition Act and after the Willis Campbell Act and superseded any previously enacted prohibition statutes inconsistent therewith.

Charles Zimmerman Sons Co. vs. Ferguson, Collector of Customs (D. C. E. D. Mich.), 16 Fed. (2) 604;
United States vs. Cardwell, 9 Fed. (2) 146.

Furthermore transportation in section 26 refers only to acts within the boundaries of the United States and not to smuggling across the border.

III.

Justice to the Innocent is More Important Than Convenience to the Government.

If this Court should now hold that section 26 is not mandatory we will have the absurd results and injustice resulting as is indicated in *United States vs. Commercial Credit Company* (*C. C. A.* 4), 20 *Fed.* (2) 519, where it was held that under *United States vs. One Ford Coupe* a forfeiture under 3450 could precede a trial against the individual but since the individual had been tried and convicted while the case as to the car

was pending in the Circuit Court, it was useless to order a new trial against the car under section 3450 since it would follow under *Port Gardner Investment Co. vs. United States,* the action would then be barred.

Such a situation warrants the comment of the Circuit Court of Appeals for the Second Circuit in *Commercial Credit Corporation vs. United States,* 18 Fed. (2) 927,

> "It is settled that after the conviction of such persons forfeiture under Section 3450 is forbidden. To say it is permitted during the pendency of the prosecution and up to the moment of conviction would be most inequitable to innocent owners and lienors and would put a premium upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons. We do not find in the Supreme Court decisions anything which compels us to take this view."

IV.

Subsequent Legislation Refutes Instead of Supports the "Basic Tax" Theory.

On page 24 of the brief for the United States it is said that section 900 of the Revenue Act of 1926—Act of Feb. 26, 1926, c. 27, 44 Stat. 9, 104; U. S. C. App., Title 26, sec. 245, supports the basic tax theory in the majority opinion in *United States vs. One Ford Coupe.* We submit the contrary is true. Subdivision 4 of that statute, amending section 600 (a), now reads as follows:

> "(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are

diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected *a tax of* $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65 or $1.10 per proof or wine gallon has been paid upon such distilled spirits *a credit of the tax so paid* shall be allowed in computing *the tax imposed by this paragraph.*" (Italics ours.)

Section 600 (a) of the Revenue Act of 1918, as amended by the Act of Nov. 23, 1921, considered by Mr. Justice Brandeis, reads as follows:

Revenue Act 1921.

Act Nov. 23, 1921, Chap. 136, Sec. 600; 42 Stat. L. 285.

Sec. 600. That sub-division (a) of Section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following:

"Provided, That on all distilled spirits on which tax is paid at the non-beverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected *an additional tax of* $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion." (Italics ours.)

Mr. Justice Brandeis in the majority opinion in *United States vs. One Ford Coupe* was apparently influenced by the language "an additional tax of $4.20" in section 600 of the Revenue Act of 1921 amending section 600-A of the Revenue Act of 1918, because that opinion says:

> "The acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, *and added to it the additional amounts* in case of illegal distillation or diversion to illegal uses. *These additional amounts also are called taxes* by Congress, and were understood by it to be such. Whether they were intrinsically penalties, and should be treated as such, we need not determine." (Italics ours.)

It is to be noted, therefore, that by the Revenue Act of 1926 Congress again uses language similar to the Revenue Act of 1918, 600 (a), Act of Feb. 24, 1919, and therefore negatives the interpretation that Congress intended a basic tax of $2.20 plus an additional tax of $4.20 for diversion. The Revenue Act of 1926 shows clearly that Congress always intended one tax only of $6.40 and this has been held to be a penalty.

Regal Drug Co. vs. Wardell, 260 U. S. 386.

V.

Interpreting Section 26 as Mandatory Aids and Does Not Retard Prohibition Enforcement.

Congress recognized that in our great social experiment of prohibition it was dangerous to go counter to reason and justice. Accordingly in section 26 it safeguarded the innocent from the deodand theory used by the courts in forfeitures under section 3450 to support the public revenue.

The guilty are punished under the Prohibition Act and in all cases the individuals have been prosecuted under that act. Why, then, should not the car be prosecuted under the same act so as to protect the innocent instead of under section 3450, where the only result is to confiscate property of the innocent. Extending the "deodand" theory—the giving of a personality to a thing—beyond the revenue statutes, and using it in fact, if not in theory, in support of prohibition is filled with great danger.

We believe that this court will give serious consideration to the efforts of Congress under section 26 to protect the innocent.

Respectfully,

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 258

COMMERCIAL CREDIT COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 36) has not been reported. The opinion of the Circuit Court of Appeals (R. 71) is reported in 17 F. (2d) 902.

JURISDICTION

The decree of the Circuit Court of Appeals was entered February 21, 1927. (R. 78.) Petition for a writ of certiorari was filed May 19, 1927, and granted October 10, 1927, under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

1. If a vehicle is seized while being used for the transportation of liquor in violation of the National Prohibition Act, does Section 26 of that Act, by reason of its mandatory provisions, furnish the exclusive method of forfeiture and disposition of the proceeds of the car, so as to preclude forfeiture proceedings under Section 3450 of the Revised Statutes for use of the car to evade internal-revenue taxes on the liquor? Are Section 26 and Section 3450 in direct conflict where transportation is disclosed?

2. If in such case the proceedings under Section 26 are not compulsory and exclusive, does the commencement of a prosecution for illegal transportation under Section 26 of the National Prohibition Act, dismissed before trial, amount to an election by the United States to proceed under Section 26 of the National Prohibition Act so as to bar forfeiture proceedings under Section 3450, R. S.?

3. Is a civil proceeding *in rem* under Section 3450 to forfeit a vehicle for use in tax evasion a "prosecution" within the meaning of Section 5 of the Willis-Campbell Act, which says that a conviction under the Prohibition Act shall bar a prosecution under other statutes on account of the same act? Does a conviction of the driver for possession entitle the United States to a forfeiture of the car under Section 26—although there is no convic-

tion for transportation—if it be made to appear that the possession and transportation were simultaneous, and thus make applicable the rule announced in *Port Gardner Investment Co.* v. *United States* that a conviction for illegal transportation under Section 26 bars forfeiture proceedings under Section 3450?

STATUTES INVOLVED

The principal statutes involved are set forth in an appendix to this brief.

STATEMENT

On November 23, 1925, the United States filed a libel of information in the United States District Court for the Western District of Washington against a Ford coupe and Leo Oppie (otherwise known as W. G. Campbell) and all other persons lawfully intervening, praying for the forfeiture of the car because it was used October 9, 1925, at the city of Seattle for removal, deposit, and concealment of intoxicating liquor with intent to defraud the United States of the internal-revenue tax thereon, which had not been paid. (R. 3.)

The Commercial Credit Company, petitioner herein, intervened. Its amended answer (R. 16) alleged that it was the owner of the legal title of the car, which had been sold and delivered to W. G. Campbell (informed against as Leo Oppie), under a conditional sales contract; that Campbell was

still indebted to the petitioner for part of the purchase price; that Campbell had defaulted in the performance of his contract, and his interest in the car had been thereby forfeited, and the petitioner was the sole owner; that Campbell had been convicted, under the name of Oppie, of violation of the National Prohibition Act, and the conviction involved the identical transaction forming the basis of the forfeiture proceedings. It alleged that it had no knowledge that the car was used or intended to be used in violation of law. A jury was waived and on March 29, 1926, the case was tried before District Judge Bourquin. The evidence (R. 24) disclosed that customs inspectors, having received reports that this car was being used by Campbell to handle a quantity of Canadian liquor and to distribute it about the city of Seattle, watched its movements for some days, and on the evening of October 9, 1925, observed the car parked in an alley back of Campbell's house. After some time Campbell came out of the house, got into the car, started its motor, and moved it to back out of the alley. Thereupon the customs inspectors stopped it and a search of it disclosed 10 quarts of whiskey and 3 quarts of gin. Campbell was arrested and the car seized. The liquor bore labels indicating that it was of foreign manufacture, and there were no stamps on the bottles showing payment of customs or internal revenue duty, and there was evidence

tending to show that no tax had been paid. The following stipulation was entered into (R. 31):

> It is further stipulated as a part of the claimant's case between the counsel for the Government and myself that the man driving this car, W. G. Campbell, was charged under the National Prohibition Law in cause number 10223 of the records of this court with unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved.

At the close of the evidence this petitioner moved to dismiss the libel on the grounds, among others, that the United States had failed to prove that the taxes on the liquor had not been paid and that the United States had elected to proceed under the National Prohibition Act against the driver and was barred from further prosecution for the same act, and that Section 3450 of the Revised Statutes had been repealed by the National Prohibition Act and the Willis-Campbell Act in so far as it related to cases of transportation or possession of intoxicating liquors. (R. 34.) The District Court denied the motion to dismiss and ordered the car forfeited and sold, and that the net proceeds of the sale be paid to the clerk of the court. The District Court made no findings, but filed a decision (R. 37–39) holding that there was sufficient evidence that the

internal-revenue tax was unpaid. On appeal (R. 78) the Circuit Court of Appeals for the Ninth Circuit affirmed the decree holding that there was no bar to forfeiture under Section 3450, because there had been no prosecution, with effect, of the charge of transportation, that charge having been dismissed, and that the conviction of the driver for possession, properly referred to Section 3 of the National Prohibition Act, did not entail a forfeiture of the automobile under Section 26.

SUMMARY OF ARGUMENT

Section 26 of the National Prohibition Act is not mandatory in the sense that proceedings under it are compulsory and therefore exclusive in the case of a car seized while used to illegally transport liquor. The contention that it is mandatory is based on its use of the word "shall." That should be construed to mean "may."

The consequences shown to result from treating Section 26 as mandatory and exclusive, as excluding forfeiture under Revenue and Customs Acts, where a vehicle used for illegal transportation is also used for evasion of taxes or smuggling, negative an intention on the part of Congress to make Section 26 exclusive.

There is no direct conflict between Section 26 and Section 3450. If Section 26 is construed to make forfeiture proceedings under it permissive, not mandatory, the argument that a conflict exists loses its force. A provision in one statute authorizing

forfeiture of guilty interests in a car used for illegal transportation is not in direct conflict with another statute providing that the whole value of the vehicle may be forfeited if its use is in violation of the Revenue or Customs Laws.

The institution of a prosecution for illegal transportation, afterwards dismissed, is not an election which bars subsequent forfeiture proceedings under Section 3450. Section 5 of the Willis-Campbell Act makes only conviction under one a bar to prosecution under the other and takes no account of a prosecution resulting in dismissal. No principle of law has been adduced to the effect that mere institution of a prosecution for an offense under one statute bars proceedings for a violation of another.

A conviction of the individual for illegal possession or any other offense, excepting illegal transportation, under the National Prohibition Act is no bar to a proceeding *in rem* for forfeiture of the vehicle for tax evasion under Section 3450. Such a proceeding is not a prosecution within the meaning of Section 5. There is no such offense as "possession in transportation." Where conviction for possession occurs, no forfeiture of a vehicle under Section 26 is entailed, and that section does not come into operation. The finding of the District Court that an internal-revenue tax was due and unpaid is not open to question here, because not raised in the application for certiorari.

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ARGUMENT

I

SECTION 26 OF THE NATIONAL PROHIBITION ACT IS NOT MANDATORY IN THE SENSE THAT PROCEEDINGS UNDER IT ARE COMPULSORY AND EXCLUSIVE IN THE CASE OF A CAR SEIZED WHILE ILLEGALLY TRANSPORTING LIQUOR

In *United States* v. *One Ford Coupe,* 272 U. S. 321, it was held, where transportation was not involved, that Section 3450 could be applied to forfeit a vehicle used as a place of concealment and deposit of intoxicating liquor for the purpose of evading an internal revenue tax. In *Port Gardner Investment Company* v. *United States,* 272 U. S. 564, it was held that where transportation was involved and there had been a conviction under the National Prohibition Act for illegal transportation, disposition of the car under Section 26 became mandatory, and resort to proceedings under Section 3450 was precluded. The questions left open by these decisions were, first, whether, if a vehicle is seized while in use for illegal transportation, the provisions of Section 26 are mandatory and compel proceedings thereunder and thereby prohibit proceedings under Section 3450, R. S.; second, if Section 26 is not by its terms mandatory and exclusive in cases of illegal transportation, is the Government required to elect which section it will proceed under, and does that election take place through the mere institution of a prosecution under Section 26, sub-

sequently dismissed; third, does a conviction of any offense under the National Prohibition Act, by reason of Section 5 of the Willis-Campbell Act, bar not only a prosecution of the individual, but civil proceedings *in rem* for forfeiture of the car under Section 3450, R. S., where the two offenses arise out of the same transaction?

1. The argument that where illegal transportation occurs the United States has no choice, but must proceed under Section 26, is grounded on the use of the word "shall" in that section, and it is contended that because of this language the United States has no election and the statute makes proceedings under it mandatory. Of course, if by reason of the language used, proceedings under Section 26 are held to be compulsory in transportation cases, and therefore exclusive, there is no election, because there is no choice.

The question is one of legislative intention, and the consequences which may flow from so construing Section 26 may throw light on the question whether Congress intended them by the use of the word "shall."

Construing Section 26 as mandatory and exclusive because of the use of the word "shall" produces the following consequences:

First. If a vehicle is used only to conceal liquor on which the tax is unpaid, complete forfeiture results; but if to the offense of evading taxes is added the offense of transportation without a permit, a less severe forfeiture results.

Second. If proceedings under Section 26 are compulsory, and therefore exclusive, where a vehicle is used for illegal transportation of liquor, the United States is not only precluded from forfeiting the car under Section 3450 for evasion of internal revenue taxes, but under any other statute imposing forfeiture for some other simultaneous offense. Sections 3061 and 3062 of the Revised Statutes (see Appendix, page 36) deal with forfeiture of vehicles used for smuggling, and, like Section 3450, do not save the interest of innocent incumbrancers. The argument based on the mandatory language of Section 26, carried to its logical conclusion, has the result that a vehicle used to smuggle intoxicating liquor and seized in the act of transporting the liquor across an international boundary may only be forfeited under Section 26, saving the interests of innocent lienors, although the offense of smuggling has simultaneously been committed entailing under Sections 3061 and 3062, R. S., complete forfeiture. Upon that theory a vehicle seized while in use for smuggling narcotics or diamonds may be completely forfeited, but if used for smuggling liquor the innocent interests are protected. Still more extreme results flow from this contention. If the vehicle carries both liquors and other merchandise, it is used in transporting liquor in violation of the National Prohibition Act, and in smuggling other merchandise, and yet Section 26 must be resorted to rather than Sections

3061 and 3062. The result would be that those engaged in using vehicles for smuggling any kind of merchandise should in all cases carry some quantity of intoxicating liquor which, in case of arrest, may be produced to bring Section 26 exclusively into operation and prevent the forfeiture of any but guilty interests. These illustrations are not overdrawn, and disclose results to flow from construing the word " shall " in Section 26 to make proceedings under that section compulsory and exclusive where illegal transportation of liquor occurs.

Third. If a person is discovered in the act of using a vehicle to illegally transport liquor, but escapes, no forfeiture of the car could result, because under Section 26 conviction of the individual must first be had, and if that section be exclusive, Section 3450 or Sections 3061 and 3062 may not be resorted to even though the car may have been used to conceal tax-unpaid liquor, or to smuggle. Again, if one is discovered in the act of using a vehicle to illegally transport, and witnesses die or fail to identify him prosecution would have to continue under Section 26, although futile, and no proceedings could be had under Section 3450.

Other illustrations might be given to show consequences which Congress could not have intended, but which flow from reading the word "shall" as used in Section 26 to require that forfeiture proceedings be had under Section 26, or not at all,

where illegal transportation occurs. It does not seem necessary to give that interpretation to the words used. With no other word in the English language have the courts taken greater liberties than with the word "shall." In *Railroad Company* v. *Hecht*, 95 U. S. 168, it was said that as against the Government the word "shall" is to be construed as "may," unless a contrary intention is manifested. In common parlance the word 'shall" has a compulsory meaning, but in law "shall" or "may" are often convertible terms. *West Wisconsin Ry. Co.* v. *Foley*, 94 U. S. 100, 103. In *Boyer* v. *Onion*, 108 Ill. App. 612, it was pointed out that the intention of the statute under consideration controls and that when the spirit and purpose of the Act require the word "shall" to be construed as giving permission it will be done. In *Fields* v. *United States*, 27 App. D. C., 433, 440, it is said:

> Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed.
>
> *Nixon* v. *Grace*, 98 Ark. 405.

In *Fleischmann Co.* v. *United States*, 270 U. S. 349, it is said (p. 360):

> The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of

> Congress. * * * And unjust or absurd consequences are, if possible, to be avoided.

See also *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Kirby*, 7 Wall. 482, 486; *United States* v. *Katz*, 271 U. S. 354, 357.

Section 3450 provides that for use in evading taxes a vehicle "shall be forfeited." It uses the word "shall," but it has not been suggested that it is therefore mandatory and exclusive and prohibits resort to Section 26, or to Sections 3061 and 3062, if the facts justify it.

If Section 26 is mandatory and compels a prosecution for transportation where transportation occurs, that mandate was disregarded here, because the prosecution for transportation was dismissed in consideration of a plea of guilty to the charge of possession, which carried less severe penalties.

Section 26 should not be construed as compulsory and exclusive, but to leave it open to the United States to proceed under either of these statutes, if not under both, where distinct offenses under each are disclosed.

There is no direct conflict between Section 26 so construed and Section 3450. This subject was dealt with at length in *United States* v. *One Ford Coupe, supra,* and *Port Gardner Investment Company* v. *United States, supra.* The contention that a direct conflict existed within the meaning of Section 5 of the Willis-Campbell Act, which continued certain laws in effect "except such provisions of

such laws as are directly in conflict with any provision of the National Prohibition Act," was itself grounded largely on the mandatory language of Section 26 (concurring opinion, *United States* v. *One Ford Coupe,* p. 335). If Section 26 is not construed as compulsory and therefore exclusive, the argument for the existence of a conflict loses its force. One statute providing that the United States *may* forfeit guilty interests in a vehicle for its use in violation of the National Prohibition Act, and another statute that the United States may forfeit all interests in the vehicle if used to evade the revenue or customs laws are not in conflict. See *Distilled Spirits,* 11 Wall. 356, 365; *United States* v. *Turner,* 266 Fed. 248; *United States* v. *One Ford Automobile,* 292 Fed. 207, 210; *United States* v. *One Bay State Roadster,* 2 F. (2d) 616, 622; *United States* v. *One Ford Coupe,* 3 F. (2d) 64, 66.

II

THE INSTITUTION OF A PROSECUTION FOR ILLEGAL TRANSPORTATION UNDER SECTION 26, WHICH IS DISMISSED BEFORE TRIAL, IS NOT AN ELECTION BY THE UNITED STATES WHICH PRECLUDES FORFEITURE PROCEEDINGS UNDER SECTION 3450, R. S.

The ordinary doctrine of election of remedies as applied in civil cases where two inconsistent remedies exist for the enforcement of one right has no application here. Sections 26 and 3450 define and punish distinct and separate offenses with different penalties. There never has been a rule of criminal

law to the effect that where a transaction results in a violation of two statutes and in the commission of two separate offenses, the mere institution of prosecution under one amounts to a final election, and forever prevents prosecution under the other, and by the same reasoning, where forfeiture results under each, the mere institution of proceedings under one does not forever preclude proceedings to forfeit under the other. The test of identity of offenses is whether the same evidence is required to sustain them, and where two distinct offenses result from one transaction requiring different evidence to sustain them not only is the commencement of a prosecution of one not a bar to the prosecution of the other, but conviction under one does not bar prosecution under the other. *Carter* v. *McClaughry,* 183 U. S. 365, 394; *Albrecht* v. *United States,* 273 U. S. 1; *Morey* v. *Commonwealth,* 108 Mass. 433.

If the institution of a prosecution for illegal transportation under Section 26 is a bar to the subsequent institution of forfeiture proceedings under Section 3450, it must be by virtue of some special statutory provision applicable to this situation, and we have been unable to find one.

Section 5 of the Supplemental Act of November 23, 1921 (c. 134, 42 Stat. 222, 223; U. S. C., Title 27, Section 3), known as the Willis-Campbell Act, provides that all laws in relation to the manufacture of and traffic in intoxicating liquor and all penalties for violation of such laws that were in

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force before the National Prohibition Act, shall continue in force, except such provisions of such laws as are directly in conflict with the National Prohibition Act or the Supplemental Act. It then provides—

> if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

This statute makes only a conviction under one a bar to prosecution under the other. It takes no account of mere prosecutions resulting in dismissal or acquittal.

If the United States has a choice, in cases where vehicles are seized while being used for illegal transportation and also for tax evasion, between prosecuting for transportation and procuring forfeiture under Section 26, and asking forfeiture under Section 3450, no principle of law has been adduced to support the contention that the election becomes final when a prosecution for transportation under Section 26 is commenced.

In the *Port Gardner Investment Company case, supra,* it was held that where a prosecution for transportation under Section 26 reaches the point where a judgment of conviction of the individual is rendered, forfeiture under Section 26 inevitably follows, and it may be said, therefore, that a prosecution for illegal transportation with effect results in final election. We infer that the conclusion so

reached in that case has for its basis that under Section 26 the criminal prosecution and the forfeiture are in a single proceeding, the judgment of conviction itself amounting to a judgment of forfeiture on the terms provided in the Act, of which the further proceedings are only in execution, and that to thereafter seek forfeiture under Section 3450 would require a disregard of or a modification of a judgment already entered. *United States* v. *Torres,* 291 Fed. 138, 144.

In the argument of the case of *United States* v. *One Ford Coupe, supra,* and *Port Gardner Investment Company* v. *United States, supra,* the United States offered the suggestion that Section 26 should be construed to mean that, in so far only as a violation of the National Prohibition Act is involved, innocent interests shall be protected, but to leave it open to the United States to insist on the forfeiture of the entire proceeds for another offense under Section 3450 if the facts warrant it, and that at any time short of the actual distribution of the proceeds of the sale of the car the Government may interpose a libel under Section 3450 claiming forfeiture of that part of the proceeds which would have been exempt under Section 26 if only a violation of that section were involved, and that the practice disclosed in *United States* v. *385 Barrels of Wine,* 300 Fed. 565, might be resorted to. The Court seems to have rejected this theory in the *Port Gardner Investment Company case,* at least to the extent of holding that it is too late to apply it after judgment

of conviction of illegal transportation under Section 26 is entered.

A prosecuting officer should be given reasonable latitude. After instituting prosecution for illegal transportation under Section 26, he may find it advisable for various reasons to discontinue. There is no good reason to say that having once commenced such a prosecution he is irrevocably committed to it.

III

A CONVICTION OF AN INDIVIDUAL OF THE OFFENSE OF ILLEGAL POSSESSION UNDER THE NATIONAL PROHIBITION ACT IS NOT A BAR TO FORFEITURE FOR TAX EVASION UNDER SECTION 3450

In the *Ford Coupe case* there had been no conviction of any offense under the Prohibition Act.

In this case there was a conviction for unlawful possession but not for unlawful transportation, and the question arises whether the conviction for possession bars a forfeiture proceeding under Section 3450, R. S. Petitioner's contention is that, although the conviction was only for illegal possession, the testimony taken in this case—not in the criminal case because there was a plea of guilty and no testimony—shows that the possession was simultaneous with illegal transportation, and a conviction of possession under such conditions is equivalent to a conviction for illegal transportation under Section 26, giving the right to forfeit the car under Section 26, and that the case therefore is the same as if a judgment of conviction for illegal transportation had

been entered, making the *Port Gardner case* applicable. This contention hardly deserves consideration. While Section 26 does use the word "possession," this Court has already said, in *United States* v. *One Ford Coupe, supra,* page 334:

> While the second sentence in § 26 uses the words "transported or possessed," the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law.

The court below said there is no such offense as "possession in transportation" (R. 75), and that the conviction for possession must be considered to have been based on Section 3, which does not entail forfeiture of vehicles.

The only conviction which under Section 26 is to be followed by forfeiture of the vehicle is conviction for illegal transportation. The offense of possession alone is covered by other sections of the National Prohibition Act. A third offense, "possession in transportation," was not intended to be defined by Section 26. In any case the only conviction here was for possession. The judgment roll in that case is not here, and we do not know whether it discloses only "possession in transportation." Certainly after a judgment of conviction for illegal possession is entered, it is not open to the United States to have a trial and take evidence on the question whether the possession was simul-

taneous with transportation, for the purpose of procuring a forfeiture under Section 26. If the conviction for possession did not entail forfeiture of the car, then the *Port Gardner case* is not applicable. Furthermore, if anything *dehors* the record in the criminal case may be considered, the evidence in the present case does not exclude the possibility that there may have been possession prior to transportation followed by possession simultaneous with transportation.

The real question on this phase of the case was mentioned in the opinion in the *Port Gardner Investment Company case, supra,* at page 566.

Section 5 of the Willis-Campbell Act provides—

> if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

There has been in this case a conviction under the National Prohibition Act of the offense of illegal possession, and the questions arise whether the stipulation in this case that the conviction of Campbell "covers the identical transaction here involved" means that a prosecution under Section 3450 would be for the same "act or offense" as was the subject of the conviction so as to bar a prosecution under the statutes relating to evasion of taxes, and also whether the word "prosecution" in the Willis-Campbell Act refers to a civil proceeding *in rem* for a forfeiture of a vehicle, or only to

criminal prosecution of the individual. A conviction of the individual under Section 3450 is a bar to the prosecution of the individual for the same act under the National Prohibition Act, and as conviction of the individual under the National Prohibition Act is, by terms of Section 26, a condition precedent to forfeiture under Section 26, it follows that a conviction of the individual under Section 3450 would prevent a summary court forfeiture provided for by Section 26, but the converse is not true. A conviction of the individual for illegal transportation under the National Prohibition Act may bar a prosecution of the individual for the same act under Section 3450, but conviction of the individual under Section 3450 is not a condition precedent to the forfeiture of the vehicle under that section. Consequently, the conviction of the individual under the National Prohibition Act for any offense except transportation under Section 26 does not bar proceedings *in rem* under Section 3450, unless the word "prosecution" in Section 5 includes a civil proceeding to forfeit a vehicle.

The ordinary meaning of the words used limits the operation of the section to criminal prosecutions and convictions of the individual. If Congress intended that conviction of the individual under one statute should bar civil proceedings *in rem* for forfeiture of inanimate objects under another, it would have used appropriate words. It would be an unwarranted enlargement of the ordi-

nary meaning of words to apply this provision of Section 5 to anything but criminal prosecutions and convictions of persons. *United States* v. *385 Barrels of Wine*, 300 Fed. 565.

The purpose of Section 5 was to prevent double punishment of the individual and two fines or sentences of imprisonment inflicted on one individual for a single act. An individual may be given two sentences and that is what Section 5 sought to prevent, but a vehicle may not be twice forfeited. Besides, as is the case here, the car may not belong to the individual convicted, and if not, its forfeiture adds nothing to his punishment.

IV

THE QUESTION WHETHER THE FINDING THAT THE TAX WAS UNPAID IS SUSTAINED BY THE EVIDENCE IS NOT OPEN HERE

Under paragraph II of its brief petitioner devotes space to the point that the facts of this case do not justify forfeiture under Section 3450, because the evidence was insufficient to show that an internal-revenue tax was due and had not been paid. This question is not before the Court. It was not suggested in the petition for certiorari nor in the supporting brief. It was not one of the grounds urged for the issuing of the writ, and certainly this Court did not issue the writ for the purpose of examining a question of fact peculiar to this case and bearing only on the title to a single automobile. It

is settled that the errors complained of must be assigned in the petition for certiorari or supporting brief, and this Court has recently dismissed writs of certiorari where it appeared that the decision of the cause required consideration of questions not raised in the petition and on which the writ issued.

The findings were supported by some evidence. The liquor was seized at a port near the Canadian line, it bore foreign brands and labels, and it was uncertain whether it had been smuggled into the United States or whether it was "domestic in masquerade." (R. 39.) In either event it was subject to an internal-revenue tax. If produced in the United States, legally or illegally, it was subject to the basic tax. *United States* v. *One Ford Coupe, supra.* If imported, it was likewise subject to the internal-revenue tax. The Revenue Acts impose the basic tax of $2.20 a gallon on spirits "produced in or imported into the United States." This tax is expressly stated to be in addition to any customs duty imposed by the Tariff Act of 1922. It is also provided that—

> Distilled spirits smuggled or brought into the United States unlawfully shall, for the purposes of this subdivision, be held to be imported into the United States,

so that even if illegally introduced into the United States, they are subject to the basic tax of $2.20 imposed by the internal revenue Acts. (See Section 600 of the Revenue Act of 1918 as amended by

Section 900 of the Revenue Act of 1926. Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104; U. S. C., App., Title 26, Sec. 245.)

In this connection it is interesting to note that Congress has by express provision said that foreign liquors smuggled into the United States, as well as those lawfully imported, shall be subject to the internal-revenue tax, thus furnishing added support to the conclusion reached in *United States* v. *One Ford Coupe, supra,* that Congress intended to impose the basic tax on domestic liquor illicitly manufactured, since there would be no reason to distinguish in this respect between liquor illegally introduced and that illegally produced.

The Tariff Act of 1922, Title I, Schedule 8, imposes a duty on imported wine and spirits. Whether the liquor in this case was domestic or foreign, it was subject to the internal revenue tax.

The provisions of the Tariff Act and of the Revenue Acts above referred to support the suggestion made on page 10 of this brief that a vehicle used to smuggle liquor into the United States is subject to forfeiture under Section 3062, because used to evade a duty, and is likewise subject to forfeiture under Section 3450 because used to evade the internal revenue tax due upon importation, although the guilty interests are subject to forfeiture under Section 26 for illegal transportation.

V

GENERAL CONSIDERATIONS

The remainder of the petitioner's brief is devoted to an argument to establish the injustice of forfeiting innocent interests in a vehicle used for law breaking by one to whom the owner has entrusted it. This is an argument which is more properly addressed to Congress. Section 3450, providing for forfeiture of vehicles for tax evasion, and Sections 3061 and 3062, R. S., providing for forfeiture for smuggling, without saving innocent interests, have been in effect for many years. The argument of the petitioner, if sound in its attack on these statutes, would have been equally effective against them before the National Prohibition Act was passed. It is too clear for argument that by the Willis-Campbell Act Congress intended to restore, if they had been impliedly repealed, Section 3450, R. S., and Sections 3061 and 3062, R. S., as applied to cases where a vehicle is used for smuggling intoxicating liquors or evasion of the taxes or duties on them. The complaint against the fairness of those statutes is now made because, as the result of unlawful traffic in liquors, forfeitures of vehicles are becoming more frequent. No doubt the business of the petitioner is, as it claims, an important link between the automobile manufacturer and the banks in connection with sale of cars on the installment plan. There is equal ground for saying that it is an important ele-

ment in the business of those violating the laws affecting traffic in and taxes and duties on liquors, in enabling them to reduce their losses through forfeitures upon arrest, by using cars held under conditional-sales contracts or subject to mortgages, and where seizure results in forfeiture of only a part of the value of the vehicle. See *United States* v. *One Saxon*, 257 Fed. 251, 253. To sustain petitioner's contention places an obstacle in the way of law enforcement. Petitioner contends that in any case of illegal transportation under the National Prohibition Act without a conviction therefor, or in case there is a conviction for any other offense under that Act, proceedings under Section 26 saving the rights of innocent incumbrancers may alone be resorted to or there is no forfeiture at all, notwithstanding other offenses under Revenue and Customs laws occur. Having established that, the next step, no doubt, will be to attempt to defeat any forfeiture whatever under Section 26 of cars held under conditional sales contracts on the ground that the guilty have no interest left in the vehicle. In this case the record shows that the conditional sales contract contained a clause to the effect that if the vehicle was used for the transportation of intoxicating liquor the interest of the purchaser should be forfeited to the vendor, and this was relied on to show that the petitioner was sole owner. (R. 32.) If Section 26 is held exclusive, compulsory, and mandatory, we expect next to be confronted with the

argument that the entire ownership of the car was innocent and nonforfeitable because the very act which the Government asserts as the ground for forfeiture operated to terminate the interest of the guilty vendee.

Respectfully submitted.

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NOVEMBER, 1927.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

Section 26, Title II, of the National Prohibition Act of October 28, 1919, ch. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be con-

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ditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant

shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 35, p. 317 (U. S. C., Title 27, Sec. 52):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compro-

mise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

Section 3450 of the Revised Statutes (U. S. C., Title 26, Sec. 1181):

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all

such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commis-

sioner of Internal Revenue as the Secretary of the Treasury may direct.

Sections 3061 and 3062 of the Revised Statutes (U. S. C. Title 19, Secs. 482, 483):

SEC. 3061. Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

SEC. 3062. Every such vehicle and beast, or either, together with teams or other motive-power used in conveying, drawing, or propelling such vehicle or merchandise, and

all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person traveling, shall willfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than one thousand dollars, nor less than fifty dollars.

Revenue Act of 1926, c. 27, Sec. 900, 44 Stat. 9, 104; U. S. C., App., Title 26, Sec. 245:

SEC. 900. Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

"(1) Until January 1, 1927, $2.20 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon;

"(2) On and after January 1, 1927, and until January 1, 1928, $1.65 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

"(5) The internal revenue tax imposed by this subdivision upon distilled spirits heretofore or hereafter imported into the United States shall, under regulations prescribed by the Commissioner, with the approval of the Secretary, be collected and deposited in the same manner as other internal revenue taxes, except that such collection

and depositing shall be by the collector of customs instead of by the collector of internal revenue. Such tax shall be in addition to any customs duty imposed under the Tariff Act of 1922 or any subsequent Act.

"(6) Distilled spirits smuggled or brought into the United States unlawfully shall, for the purpose of this subdivision, be held to be imported into the United States, and section 3334 of the Revised Statutes, as amended, shall be applicable to any sale thereof."

* * * * *

Schedule 8, paragraphs 801, 802, 803, and 813, of the Tariff Act of 1922, c. 356, 42 Stat. 858, 897, 898; U. S. C., Title 19, Sec. 121:

PAR. 801. Nothing in this schedule shall be construed as in any manner limiting or restricting the provisions of Title II or III of the National Prohibition Act, as amended.

The duties prescribed in Schedule 8 and imposed by Title I shall be in addition to the internal-revenue taxes imposed under existing law, or any subsequent Act.

PAR. 802. Brandy and other spirits manufactured or distilled from grain or other materials, cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and bitters of all kinds (except Angostura bitters) containing spirits, and compounds and preparations of which distilled spirits are the component material of chief value and not specially provided for, $5 per proof gallon; Angostura bitters, $2.60 per proof gallon.

PAR. 803. Champagne and all other sparkling wines, $6 per gallon.

PAR. 813. No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

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